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CONVEYANCER'S NOTEBOOK

MORTGAGEE'S COSTS

The decision of Vaisey J. in *Re Adelphi Hotel (Brighton), Ltd.* [1953] 1 W.L.R. 955 (noted *ante*, p. 305) seems to have caused a certain stir amongst conveyancers. In that case proceedings were taken by mortgagees to enforce their security and in due course an order was made for their costs of the action and as mortgagees to be taxed. They then applied for an order that the costs should be taxed as between solicitor and own client, or at any rate, as between solicitor and client. The learned judge held that both sets of costs should be taxed as between party and party. Correspondents have written asking us to publish a precedent to enable mortgagees to recover their costs as between solicitor and own client, but it seems to us that there is a difficulty.

So far as the costs of the action are concerned Vaisey J.'s judgment should come as no surprise as it has been settled for a long time that the costs should be taxed as between party and party: *The Kestrel* (1866) L.R. 1 A. & E. 78. It is equally well settled that the mortgagee's costs of the action are not normally within the discretion of the court: the mortgagee is entitled to his costs unless he is guilty of some improper conduct, but except to this extent costs are a matter for the discretion of the court. We do not see how this discretion can be ousted. Can the litigants agree in relation to proceedings generally that the costs shall fall upon one of the parties, to be taxed on a certain scale, in any event? We appreciate that there are cases where it would be proper to make such an agreement with regard to specific proceedings about to be instituted, but surely this is not one of that

type of case. Assuming the agreement would be valid it seems to us that it would be oppressive. Why should an unfortunate mortgagor have to pay for any luxurious expenditure by the mortgagee? The present law does not seem to have caused undue hardship in the past, although there is some good ground for arguing that the costs should be taxed as between solicitor and client.

With regard to the mortgagee's costs, other than in relation to the litigation, with respect, we find difficulty in following the judgment. Costs in non-contentious business are governed by Schedule II of the Solicitors' Remuneration Order, 1883, as amended, and there are not separate scales under this order. It is, of course, perfectly true that there may be certain items which the mortgagee's solicitor can charge against his client which the mortgagee cannot charge against the mortgagor, for example, the costs of collecting the mortgage interest: *Law Society's Digest*, Opinion 1522. Indeed, there is a number of opinions in the *Law Society's Digest* on what specific items are properly chargeable against the mortgagor. It may well be that this was all Vaisey J. had in mind when he said that the mortgagee's costs so far as related to the non-contentious work should be taxed on a party and party basis, but he quite clearly stated, at p. 958, that the expression "party and party costs" is not restricted to litigation.

There are other cases where costs in non-contentious business have to be paid by third parties, for example, in relation to a licence to assign, but we feel sure that it is universally accepted that the costs paid in such a case are a complete indemnity. One correspondent expresses the fear that, as the new Schedule II is in such general terms, taxing masters will make an arbitrary deduction from the total amount payable by the client so as to leave the third party with a lesser sum to pay.

We do not think that *Re Adelphi Hotel (Brighton), Ltd.*, really laid down any new law or cut down what has generally been understood to be the mortgagee's rights with regard to his costs. No doubt it would not be difficult to devise words to extend the mortgagee's rights in this respect, but we doubt whether there is sufficient justification.

Practice on First Registration

It appears that there has been a recent change in the practice of the Land Registry with regard to first registration. In the past it has not been necessary to send a certified copy of the conveyance or transfer inducing first registration unless the applicant wished to have the original back. The Land Registry now insist on a copy

in every case. Indeed, in one letter from the Land Registry it was stated that the writer had never heard of the contrary practice. When referred to specific cases the reply was that " in the light of experience it is felt desirable that the deed inducing first registration . . . should normally be in the applicant's possession after completion of the registration with a certified copy filed in the Registry." We are unable to see how the Land Registry can be assisted by insisting on the copy instead of retaining the original, and it seems to be merely an example of creating unnecessary work for the practitioner.

Accommodation Agencies Act, 1953

This Act, which came into force on August 14, was passed to stamp out certain undesirable practices of accommodation agencies, and it is therefore surprising to find that it is only a temporary Act, continuing in force until December 31, 1957. It makes it illegal to demand or accept payment for registering the name or requirements of a person seeking the tenancy of a house, to demand or accept payment for supplying addresses or other particulars of houses to let, and to issue advertisements, lists or other documents describing houses as being to let without the authority of the owners. Offences are punishable on summary conviction with a fine up to £100, with imprisonment up to three months, or with both. There are certain exceptions protecting ordinary business transactions: demanding or accepting an agent's remuneration from the owner of a house, demanding or accepting payment for work done as a solicitor and demanding or accepting payment for advertisements in a shop or newspaper in the ordinary course of business.

RECENT LEGISLATION

Local Government (Miscellaneous Provisions) Act, 1953

This Act came into force on August 14. Sections 1 to 3 deal with finance and sections 4 to 7 with bus shelters.

Dustbins

Under the Public Health Act, 1936, s. 75 (1), which applies outside London, the local authority may by notice require the owner or occupier of premises to provide a dustbin of such material, size and construction as the local authority approve. Any person aggrieved by a requirement of the local authority may appeal to a court of summary jurisdiction. Under subsection (3) the local authority may itself supply the dustbin at an annual charge which may be recovered as part of the general rate, but without prejudice to the right of any person under any agreement.

Many local authorities prefer to proceed under subsection (1) and serve the notice on the owner. The owner, especially if he owns a number of rent-restricted flats, finding the cost of dustbins has become multiplied a number of times since the war and that he cannot usually get recouped, objects strongly and feels the tenant should bear the expense. In *Croydon Corporation* v. *Thomas* [1947] K.B. 386 it was held that the local authority had a judicial, and not an arbitrary, power of selecting between the owner and the tenant and, in general, magistrates' courts have set aside notices served on owners.

Section 8 (4) of the Local Government (Miscellaneous Provisions) Act provides that, where an appeal is brought under section 75 (1) in respect of a notice served on an owner or occupier and the appellant alleges that he is not the one who should in equity have been served, he must serve a copy of his notice of appeal on the occupier or owner, as the case may be. On the hearing of the appeal the court may make such order as it thinks fit with respect to compliance with the notice by either the landlord or the tenant and, in exercising its powers, it shall have regard to the terms and conditions, whether contractual or statutory, of the tenancy. The procedure is assimilated to that under the Public Health Act, 1936, s. 290, where a notice requiring the execution of works is served on a landlord or tenant.

Sometimes under a local Act the local authority can serve a notice to provide a dustbin on the owner and the Act does not give

any right of appeal. In such a case there is nothing to compel the authority to proceed under the Public Health Act, 1936: *Daly* v. *Ashcroft Properties* (1948) 151 E.G. 80.

Where a local authority provides the dustbins, whether under the Public Health Act, 1936, s. 75 (3), the London County Council (General Powers) Act, 1939, s. 67 (1) (a) or any other Act, it is now authorised to charge up to 5s. per annum; and this sum may be increased by ministerial order: 1953 Act, s. 8 (1) to (3).

Contributions under the New Streets Act

Section 9 of the 1953 Act makes a minor amendment in the calculation of the amount to be paid or secured under the New Streets Act, 1951.

Closing Orders

It will be remembered that in *Birch* v. *Wigan Corporation* [1952] 2 All E.R. 893 (see Vol. 16, p. 399) it was held that a closing order could not be made under the Housing Act, 1936, in respect of a whole house in a terrace. This decision has been overruled by section 10 of the 1953 Act, which provides that, where a local authority, apart from the section, would have to make a demolition order, it may, if it considers it inexpedient to do so " having regard to the effect of the demolition of that house upon any other house or building," make a closing order instead. The local authority may subsequently revoke the closing order and substitute a demolition order. Section 160 of the Housing Act, 1936, which enables a county court to determine or vary a lease of premises in respect of which a demolition order has become operative, is applied to premises in respect of which a closing order has become operative under section 10 of the 1953 Act. The new provision is retrospective: section 11 (2).

Demolition Orders

Once a demolition order has been made, subject to the right of appeal, it cannot in general be revoked, but the Housing Act, 1949, s. 2, provided for the quashing of certain demolition orders on the request of the owner to the local authority before July 30, 1950. Section 11 (1) of the 1953 Act revives this provision for twelve months, *i.e.*, until July 14, 1954.

Valuation for Rating Act, 1952

There is little doubt that almost any government would be too frightened of the political consequences to value dwelling-houses for

rating at current rents and the Local Government Act, 1948, provided for the new lists to be based on pre-war rents. The two methods of valuation introduced by the 1948 Act have proved unworkable and have accordingly been repealed: section 1 of the 1953 Act.

Section 2 provides that, for the purpose of the new first valuation lists made hereafter, the gross value of a private dwelling-house, private garage or private storage premises shall be the rent at which the hereditament might reasonably have been expected, on or about June 30, 1939, to let from year to year if the tenant had undertaken to pay all usual tenant's rates and taxes and if the landlord had undertaken to bear the cost of the repairs and insurance, and the other expenses, if any, necessary to maintain the hereditament in a state to command that rent—the pre-war formula in fact. When one starts valuing post-war buildings at pre-war rents, difficulties crop up. So the section goes on to provide that it shall be assumed (i) that the hereditament was in existence in 1939 in the state in which it actually is at the time of valuation and (ii) that the locality in which the hereditament is situated was in 1939 in the same state as it is at the time of valuation. But even these qualifications are not enough. When considering the occupation and use of other premises, which are now used for residential purposes and were so used in 1939, any increase in the number of persons so using the premises shall be disregarded, except in so far as it affects the amenities of the locality or of the hereditament being valued. (Pretend there is no housing shortage.) Yet further assumptions must be made. Where it becomes apparent that, by reason of the operation of the Rent Restrictions Acts on other property in the locality or a marked scarcity or abundance of dwellings, or both, the valuation would be unduly high or unduly low in relation to the rents which prevailed in 1939 for other houses in the locality, or neighbouring localities, then the rent shall be determined as though in 1939 all property of a kind comparable with the dwelling-house being valued had been due shortly to become free from the Rent Restrictions Acts and the supply of property for letting had more or less equalled the demand. (In applying this obscure provision it should be remembered that in June, 1939, the number of houses subject to the Rent Restrictions Acts was only a fraction of what it is now.) Nevertheless, the principle, that in determining the gross value of a hereditament no account is to be taken of any restriction on rent imposed by the Rent Restrictions Acts (or any other Act), is unaffected.

If in any particular case it appears that the current rental value is less than the 1939 rental value, valuation will be based on the current value.

Section 3 contains definitions of " dwelling-house," " private garage " and " private storage premises."

Section 4 makes provision for premises part of which is used wholly as a dwelling-house and the remainder is not. If the part which is so used is less than one-tenth of the rateable value of the whole premises (calculated without regard to the 1953 Act), the 1953 Act does not apply to the premises at all. If the part is at least one-tenth of the rateable value, in effect, the 1953 Act applies to that part. There are certain exceptional cases, for example, on-licensed premises, where the 1953 Act does not apply even though the residential part exceeds one-tenth of the value of the whole premises.

Agricultural Dwelling-houses

There are special provisions relating to agricultural dwelling-houses (section 5). An agricultural dwelling-house is defined as a dwelling-house occupied in connection with agricultural land and used as the dwelling of a person who (a) is primarily engaged in carrying on or directing agricultural operations on that land, or (b) is employed in agricultural operations on that land in the service of the occupier thereof and is entitled (whether as tenant or otherwise) so to use the premises only while so employed. In such a case, to arrive at the rateable value, the notional letting is assumed to be on terms precluding the dwelling-house from being occupied otherwise than in connection with agricultural land and from being used otherwise than as the dwelling of such a person as aforesaid.

Additional Services provided by Landlord

Section 6 removes a long-standing grievance of landlords who let premises at a rent which includes the value of services provided by them: no account was formerly taken of the value of the services: Rating and Valuation Act, 1925, s. 68, proviso. It is now provided that in valuing a dwelling-house, private garage or private storage premises, whether under the Valuation (Metropolis) Act, 1869, the Act of 1925 or the Act of 1953, where regard is had to the rent payable under an actual letting of the premises and the circumstances of the letting include or included the provision by the landlord of services, any profit which the landlord makes or made in providing the services is to be excluded in determining how much

of the rent is or was attributable to the provision of the services. "Services" means services other than repairs, insurance and maintenance.

EMERGENCY LAWS (MISCELLANEOUS PROVISIONS) ACT, 1953

This Act makes certain emergency provisions permanent. The following may be noted:—

(1) Where a landlord applies under the Rent Restrictions Act, 1933, Sched. I, para. (g), to the Minister of Agriculture and Fisheries for a certificate that a person for whose occupation the landlord requires a dwelling-house is an agricultural worker, the Minister must, despite his being satisfied on the facts, withhold his certificate if he is also satisfied that the existing tenant is an agricultural worker employed by someone other than the landlord and the production of food will be better promoted by the existing tenant's remaining in this house. (This replaces Defence (Agriculture and Fisheries) Regulations, 1939, reg. 28A.)

(2) Where a dwelling-house held on a weekly tenancy is or has been requisitioned and for three weeks before the requisition the tenant has neither occupied the house nor paid the rent, the requisitioning authority may serve a notice on the tenant and, if it does, must then pay the compensation to the landlord who may retain it *pro tanto* against any liability of the tenant for rent during the period covered by the compensation, holding the balance (if any) for the tenant. And, where any premises are the subject of a lease and are requisitioned and either the lessee is exempt from paying rent under the Landlord and Tenant (War Damage) Acts, 1939 and 1941, or is six months in arrear with his rent and cannot be found, the lessor may apply to the requisitioning authority to pay the compensation direct to him and he may retain it in the same way. Where a lessee is paid compensation rent as a result of requisitioning but under the Landlord and Tenant (War Damage) Acts, 1939 and 1941, is exempt in whole or in part from paying rent under his lease, the compensation rent in whole or *pro tanto* is recoverable by the lessor from the lessee. (This replaces the Defence (General) Regulations, 1939, regs. 68AB and 79CA.)

(3) Section 5 revokes the Defence (General Regulations), 1939, reg. 62A, which empowered local authorities to let land for use as allotments, but authorises them to continue to let such land.

(4) The Settled Land and Trustee Acts (Courts General Powers) Act, 1943, s. 1, which empowered the court to make an order under the Settled Land Act, 1925, s. 64, or the Trustee Act, 1925,

s. 57, sanctioning transactions not authorised by the settlement or trust, and to authorise the expenditure to be treated as a capital outgoing, is continued in force permanently. The section has also been amended: diminution of income " by reason of circumstances arising out of war conditions " was one of the conditions requisite for the authorisation of capital expenditure; the new Act repeals the words quoted.

THE LAW SOCIETY'S NEW CONDITIONS OF SALE

(*continued from p.* 272)

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CONDITION 21

(Where no Pre-contract Search or Inquiry)

In view of the importance of this new Condition which can be applied (if the vendor agrees) in cases where the purchaser is not searching prior to contract, it has been fully discussed in an earlier part of this article. Certain minor points may, however, be mentioned here.

First, it is not clear whether the vendor must be given an opportunity of " showing " that the purchaser had written notice of the matter to which he objects before he serves a notice : see Condition 21 (2) (b). It is submitted that it would have been simpler to relegate this point to the provisos making the notice void in certain events.

Secondly, the practitioner should note that he must not delay searches and inquiries after contract as, if notice of rescission becomes necessary, it must be given within 21 days after the date of the contract.

Thirdly, it may be thought premature to permit the rescission notice to become void immediately the vendor undertakes to procure *on* or before completion the revocation cancellation or removal of the matter and of any registration thereof, as the vendor may be quite unable to fulfil that undertaking. It remains to be seen whether the courts would permit rescission by the purchaser, as a matter of course, if the undertaking were not fulfilled. However, as the parties would, *ex hypothesi*, have agreed to treat such a matter as one justifying rescission it seems probable that the purchaser could rescind once more if the undertaking were not fulfilled; but it is not clear why the Condition does not defer the avoidance, making it operate only on the vendor complying with his undertaking before completion. In that connection it will be observed that the undertaking by the vendor is to get rid of the offending matter on or before completion. " The words ' on ' or ' upon,' it has been decided, may either mean *before* the act done to which it relates, or *simultaneously with* the act done, or *after*

the act done, according as reason and good sense require with reference to the context and the subject matter of the enactment," said Denman C.J. in *R.* v. *Arkwright*, 18 L.J.Q.B. 28; 12 Q.B. 960, citing *R.* v. *Humphery*, 7 L.J.Q.B. 202; 10 Ad. & E. 335; and see *Paynter* v. *James*, L.R. 2 C.P. 354. As the words of the Condition are " on *or* before " and effect must be given to the word " on " it is clear that the purchaser cannot require the fulfilment of the undertaking *before* completion. It is possible that he may be able to require fulfilment simultaneously with completion (if that is ever really practicable). In view of the points above mentioned some practitioners may feel that it is necessary to declare by special condition that the words " if the vendor procures before completion " shall be substituted for the words " if before the expiration of any such notice the vendor undertakes to procure on or before completion " in paragraph (ii) of the proviso to General Condition 21 (2).

CONDITION 22

(Town and Country Planning)

See the remarks in the first part of this article and the Explanatory Notes, paragraph 34.

CONDITION 23

(Tenancies)

Under the former Conditions there was a statement, often quite incorrect, that the counterparts of leases or tenancy agreements or abstracts or copies could be inspected at the office of the vendor's solicitors and at the sale room. That statement has now quite rightly been omitted. Those desiring to inspect such documents will as a matter of course apply to the auctioneers or the vendor's solicitors.

Condition 23 (3) would not normally be left to operate, as it provides for cases where a tenancy affects more than one lot or affects property besides that which is being sold, and enables the vendor or his agent to fix the apportioned rent which the purchaser is to receive (if not stated in the Special Conditions or Particulars of Sale).

Such a matter would normally be the subject of a Special Condition.

CONDITION 24

(Rent Act Tenancies)

At first reading the additions now made to this Condition (formerly 22) appear to widen its scope considerably, but the new

references to any other statutory provision or enactment appear, in fact, to be limited to provisions or enactments controlling the rent or other terms of any tenancy of the property. This Condition requires the vendor upon request to supply any information in his possession as to the recoverable rent, and as to compliance with any obligation imposed by the Rents Acts or any such statutory provisions or enactments or any proceedings taken thereunder and affecting the property. Under Condition 24 (2) the vendor is required to indemnify the purchaser against claims for compensation made by the tenant under the Agricultural Holdings Act, 1948, or the Landlord and Tenant Act, 1927, or under any other statutory provision or enactment or by custom, agreement or otherwise, where the tenancy expires or is determined on or before the date fixed for completion. The vendor's solicitor will therefore need to consider this point when settling Special Conditions.

CONDITION 24 (3)

(INCOME TAX)

A purchaser is often at a disadvantage when making a claim to tax relief owing to his lack of knowledge of moneys expended previously on the property and other information. Condition 24 (3) contains provisions designed to remedy this situation by requiring certain information to be supplied by the vendor upon request.

OMITTED CONDITION

(NOTICE TO QUIT AFTER CONTRACT)

Under the former Condition 22 (3) the purchaser of an entire agricultural holding could require the vendor before completion to serve a notice to quit on the tenant, if he agreed to indemnify the vendor against consequential claims by the tenant. That provision was not any great protection to the vendor if the purchaser defaulted owing to his inability to find the purchase money, or if the sale went off for some other reason. The vendor would have burned his boats, because he could not withdraw the notice, and if it took effect, the vendor might then be left with a vacant farm, which might not be satisfactory to him.

Hence, it is doubtful whether such a general condition was suitable, or whether it was a matter for a special condition in cases where the parties had so agreed.

It will also be appreciated that a vendor agreeing to serve a notice to quit before or after contract might wish to make it clear by a special condition that he did not warrant that the notice to quit

would be effective; see sections 23–33 of the Agricultural Holdings Act, 1948. If a notice to quit is to be served *before* contract, the vendor's and purchaser's solicitors will need first to study carefully section 30 of the last mentioned Act, as well as the other sections above mentioned, noting that section 24 applies to notices served before or after a contract of sale, and that the prescribed period referred to in section 30 (2) (a) is to be found in the Agriculture (Miscellaneous Time Limits) Regulations, 1948 (1948 S.I. No. 188 Reg. 4).

CONDITION 25

(Insurance)

The only alteration here is that the Condition now extends to any insurance of the property against damage, and not merely damage by fire.

CONDITION 29 (2)

(Existing Covenants)

Words have now been inserted in this Condition to cover a small drafting point. Formerly (under Condition 27 (2)), it was provided in relation to covenants under which the vendor would remain liable after completion, that unless the vendor or an estate which he represented as personal representative or trustee was interested in the performance of the covenant, the covenant by the purchaser to perform the covenant should be by way of indemnity only. It was possible to argue that by reason of the continuing liability above mentioned the vendor or the estate which he represented would always be so interested; but a few words have been added which make it clear that unless there is some interest beyond that mere continuing liability, the covenant is to be by way of indemnity only. It seems a little doubtful whether the result is that the vendor if in fact "interested" within the meaning of the Condition, could require the purchaser to covenant suitably, *e.g.*, "for the benefit of the adjoining land and premises known as Blackacre," as this would mean that the vendor could (after contract) specify the grounds on which he was interested, and the property to which the benefit of the covenant was to attach (in addition to the land which already had the benefit of the covenant). This might operate very harshly upon the purchaser. However, it is thought that the Condition does not have the effect of extending the area of the land already benefited, whether it does or does not enable a vendor who is interested in the land already benefited to exact a new covenant between the purchaser and himself for

the benefit of that land or the part of it in which he is interested. It is hoped that in practice, where a vendor wishes to be able to enforce an existing covenant, he will by special condition stipulate for a new covenant by the purchaser with him to the same effect for the benefit of specified land in which he is interested and not stipulate merely for a covenant to observe the existing covenant, which is all that he can apparently require under Condition 29 (2). It is settled that in the absence of evidence of a bargain between the parties that such a covenant (*i.e.*, to observe existing restrictions) is to be enforceable *by the vendor* for the benefit of land owned by him, it will operate by way of indemnity only: *Reckitt* v. *Cody* [1920] 2 Ch. 452.

As above indicated, the appropriate course is by way of special condition stipulating for a new covenant with the vendor along the lines indicated in Condition 30, identifying the property in which the vendor is interested, the covenant being expressed to be for the benefit of that property.

CONDITION 32 (3)

(Production and Tracing of Deeds)

The former Condition 30 (3), which is now replaced by Condition 32 (3), provided that the vendor should not be required, in effect, to produce or trace any document not in the possession or control of the vendor or of his mortgagee or trustee, nor, save at the purchaser's expense, to supply any information in relation thereto not within his knowledge. That provision was capable of operating inequitably, and has been revised. It is questionable whether the purchaser's position has been materially improved by the revision, which is phrased in a rather back-handed manner to the following effect:—

> As to any document not in the possession of or under the control of the vendor his mortgagee or trustee—
>
> (1) *Documents which need not be abstracted.*
>
> The vendor is not bound to produce it or hand it over or to trace it *or state who has the possession of it* (which he should surely do without charging the purchaser if he knows who holds it), nor, save at the purchaser's expense, to supply (which means obtain and supply) in relation thereto any information not within the knowledge of the vendor, his mortgagee or trustee. It is, of course, assumed that the document in question, though not required to be abstracted, is material: otherwise *cadit quaestio.*

(2) *Documents which should be abstracted.*

(a) Here the vendor must at his own expense give the purchaser all information within the knowledge of the vendor, his mortgagee or trustee as to the custody of the document.

(b) If the document ought to be in the possession of the vendor, his mortgagee or trustee, the vendor needs only to *use his best endeavours* to trace and secure the production and delivery to the purchaser (if so entitled) of the document.

(c) Save as provided in sub-paragraphs (a) and (b) above, paragraph (1) above (which relates to documents which need not be abstracted) will apply as if the document were not required to be abstracted. The effect may be clear to other practitioners, but is not clear to the present writer. The general idea seems to be that the rights of the purchaser are exclusively contained in what has gone before (as summarised in sub-paragraphs (a) and (b) above), except that if the purchaser is prepared to meet the expense he can require the vendor to obtain and supply any information desired by the purchaser concerning the document.

It is submitted that as to documents which should be abstracted and ought properly (a) to be in the possession of the vendor or his mortgagee or trustee and (b) to be handed over to the purchaser, it is quite wrong that the vendor should be required only to use his best endeavours to trace, produce and hand them over on completion; see (2) (b) above. If the vendor should be, but is not, in a position to produce and hand them over on completion he should not be given protection by a general condition. His inability to comply with such a primary obligation should be disclosed in a special condition so that the purchaser would have an opportunity of deciding whether to proceed. As it is, the General Condition does not even provide for secondary evidence of such a document: see *Re Halifax Commercial Banking Co. & Wood* (1898) 79 L.T. 536; *Hart* v. *Hart* (1841) 1 Hare 1.

CONDITION 33

(Obligations after Completion)

This new Condition, which expressly keeps effective the terms of the contract in so far as effect is not given to them by the Conveyance, should be welcome, as although it may do no more than repeat

the general law, it is, in practice, often difficult to persuade a vendor's solicitor to accept that view.

CONDITIONS 34 and 35

(Misdescription and Compensation)

These Conditions were dealt with in the first part of this article. It should suffice to mention that if the vendor's solicitor considers it his duty to stipulate that there shall be no compensation for errors, omissions or misstatements, it will be necessary for him to insert (as paragraph 12 of the Special Conditions) the words mentioned in footnote (j) to the printed Special Conditions of the Law Society. As it has been a fairly general practice for the purchaser's solicitor to stipulate that the condition negativing the right to rescission or compensation for errors shall apply only to "trivial" or "slight" errors, presumably some practitioners will insert some such provision and will also negative the application of Condition 35 in cases where the error "materially affects the description of the property," if the vendor's solicitor will not agree that Condition 34 shall apply. It is submitted that a purchaser's solicitor ought not to accept Condition 35, as it stands, without instructions from his client to do so.

CONDITION 36

(Forfeiture of Deposit and Resale)

This Condition (formerly No. 32) has been substantially revised. Formerly the right to forfeit the deposit and resell was declared to be exercisable if the purchaser failed to perform his part of the contract after the vendor had given to the purchaser at least 14 days' notice in writing specifying the default and failure by the purchaser to make good the default within that period. No distinction was taken in the Condition between cases where time was of the essence of the contract and those where it was not.

There is some authority for saying that where time is not of the essence of the contract, owing to the nature of the property, or by express stipulation or necessary implication, *all* the provisions of the contract as to time are to be read as meaning that the acts are to be done by the time specified or within a reasonable period thereafter: see Williams on Vendor and Purchaser (4th ed.) at p. 58 and the cases cited in footnote (l) to that page. On that hypothesis, the authors of that work observed with regard to a similar provision in the Statutory Conditions of Sale (which applies to contracts by correspondence), that it seemed "to be distinctly

disadvantageous to the vendor." Their argument was that first there must, under an open contract, be unreasonable delay, whereupon the party so delaying will be in default and the other party can thereupon exercise his remedies without serving any notice; but under the Statutory Conditions until unreasonable delay had occurred there was no breach, and therefore the party not in default must first wait a reasonable time and then serve the notice. That may be correct, but if the suggestion is that where a purchaser has been guilty of unreasonable delay, and there is no condition as to notice, a vendor can treat the contract as repudiated merely by informing the purchaser to that effect, it is submitted that this (even if good law) would not be a very businesslike situation. The vendor could not be certain that the court would consider that the purchaser's delay *was* unreasonable, and the purchaser would certainly feel that he should be told of the alleged default and given a reasonable period in which to make it good.

Before dealing with the Condition as revised, it is desirable to point out that although it has often been said by the court that a party cannot "unilaterally" or by his own "volition" or "motion" make time of the essence (see *e.g. Green* v. *Sevin* (1879) 13 Ch.D. 589; *Smith* v. *Hamilton* [1951] Ch. 174; [1950] 2 All E.R. 929) the fact remains that all good or bad things must come to an end; and those judicial dicta merely mean that it is not possible for a vendor, where time is not of the essence, to decide effectively upon the period within which the purchaser shall be allowed to complete. Having made a contract under which the purchaser is required to complete within a reasonable time after the date nominally specified, the vendor cannot effectively say thereafter "I fix 14 days as a reasonable time." If he purports to do so the court will decide whether the period was or was not a reasonable one. As Lord Parker said in *Stickney* v. *Keeble* [1915] A.C. 419: "In considering whether the time so limited is a reasonable time, the court will consider all the circumstances of the case. No doubt what remains to be done at the date of the notice is of importance, but it is by no means the only relevant fact. The fact that the purchaser has continually been pressing for completion, or has before given similar notices which he has waived, or that it is specially important to him to obtain early completion are equally relevant facts." That passage was cited by Denning L.J. in *Charles Rickards* v. *Oppenheim* [1950] 1 All E.R. 420, and although the subject matter of that decision was the sale of a car, the judgments are of great interest in relation to the question of "reasonable notice."

Be it noted that the cases in which the court has said that one party cannot make time of the essence are no true guide to the

situation where the contract provides a time limit and the wording necessarily means that such time limit must be observed : see *Harold Wood Brick Co. Ltd.* v. *Ferris* [1935] 2 K.B. 198.

The desirability of requiring notice before forfeiture and resale has been stressed above. Harman J. decided in *Smith* v. *Hamilton supra* that where time is not of the essence of the contract, the provision in the Natural Conditions of Sale 15th ed., for forfeiture of the deposit and resale *without notice* " if the purchaser shall neglect or fail to complete his purchase according to these conditions " did not entitle the vendor fifteen days after the date for completion to serve notice forfeiting the deposit and announcing his intention to resell (despite the fact that he had warned the purchaser of his intention immediately the date for completion had arrived).

There is no doubt that time *can* be made of the essence of the contract by express stipulation. " The special jurisdiction of equity to disregard the letter of the contract [as to the time for completion] . . . might be excluded by any plainly expressed stipulation," *per* Lord Haldane in *Jamshed Klodoram Irani* v. *Burjorji Dunjibhai* (1915) 32 T.L.R. at p. 157, and many other authorities can be cited for that statement. Moreover, it is to be emphasised that, in principle, cases in which it is laid down that a party cannot *unilaterally* make time of the essence have no bearing on special provisions inserted in the contract as to the giving of notices, as the party serving the notice is not purporting to make time of the essence. He is merely exercising a right which the other party has conferred upon him by the contract, and in respect of that right time may or may not have been made of the essence. If the contract prescribes a specific period of notice there can be no obligation to specify a longer period. The notice might conceivably be invalid if he did so. But it is quite another question whether the contract, *as operating in equity*, entitles the party serving the notice to serve it at the time when he does in fact serve it, *e.g.*, owing to his own conduct, or other material circumstances.

With those preliminary words it is now suitable to refer to the revised form of the Law Society's Condition for forfeiture of the deposit and resale. Let it be said that in the present writer's opinion the revised Condition is admirable, and that the following remarks constitute a criticism of the Explanatory Notes only.

The revised Condition (now No. 36) is referred to in paragraph 4 of the Explanatory Notes. Although those notes are in general most reliable, it is feared that paragraph 4 is in a different category. After referring to paragraph (1) of the revised Condition, which provides, in effect, that on default by the purchaser " (including

any delay in completion whether or not time is of the essence of the contract) " the vendor may give *at least* 21 days' written notice specifying the default and requiring it to be made good before the expiry of the notice, the deposit to be forfeited and the vendor to have the right to resale if the purchaser does not comply, it is said that the provision has been inserted in order that there may be no doubt as to the exact day on which the vendor's right to resell will arise. It is not proposed to discuss the decision in *Pedigree Stock Farm Developments Ltd.* v. *Wheeler & Co. Ltd.* (1950) 155 Estates Gazette 66, where it was held that a clause requiring the giving of " at least " 14 days' notice entitled the court to hold that a longer period of notice was necessary in the circumstances; but that decision should be noted in connection with the submissions made below.

According to the Explanatory Notes the effect of the revised Condition is that the purchaser becomes subject to a 21 days' notice once he has failed to complete on the day fixed for completion " whether or not the contract is one in which time has been made of the essence." There is no doubt that the court might take the view that in order to give full effect to the Condition the words " whether or not time is of the essence of the contract " must mean " whether or not *in other respects* time is of the essence of the contract "; but it is equally possible that as the Condition does not unmistakably make time of the essence for the purposes of the Condition, the court might hold, in conjunction with the words " *at least* 21 days," that it was free to consider whether the period of 21 days was in fact a sufficient period. Indeed it could hardly be argued that it was not contemplated that in some cases it might be necessary to give more than 21 days' notice. Such an argument would be tantamount to saying that " at least 21 days " means precisely the same as 21 days, except that a benevolent vendor would not be penalised by generously giving a longer notice, a result which he could achieve quite as simply by refraining from giving the 21 days' notice until a later date. Chitty J. is reported as having said in *Re Railway Sleepers Co.*, 29 Ch.D. 204 " I do not see any distinction between ' 14 days ' and ' at least 14 days ' "; but is it really arguable that, say, one month's notice does not comply with the requirement of " at least 14 days' notice "? (*a*). The view that the words " at least " in connection with such a condition enable the court to decide what period of notice is reasonable in the exercise of its equity jurisdiction is

(*a*) Chitty J. was not discussing an equitable doctrine, but was dealing with a company matter in which it was necessary that a certain period should elapse between two events, there being no right in equity to extend or reduce that period.

supported by the *Pedigree Stock Farm Case, supra.* The Explanatory Notes draw attention to the possible desirability of extending the period of notice beyond 21 days (*i.e.* by a special condition to that effect) in the case of large transactions, but possibly the emphasis should be on the need for a special condition eliminating the words "at least" before the words "21 days" and making time of the essence of the contract for the purpose of this Condition if it is of importance that the vendor should be able to serve a valid 21 days' notice immediately after the date fixed for completion.

Contrary to the view expressed in the Explanatory Notes the following propositions are submitted :

(1) If the court came to the conclusion that in proceedings for specific performance brought by the purchaser it would have rejected the purchaser's claim on the ground that a 21 days' notice was sufficient, then it would hold that the notice was effective. If not, it would hold that the words "at least" enabled the court if it thought fit (according to the conduct of the parties and the circumstances) to determine that the notice should have given the purchaser a longer period in which to complete and was therefore ineffective. If that is the correct view, the result appears to the present writer to be eminently satisfactory. If the vendor intends to make time of the essence, either by reference to the date fixed for completion or by reference to the expiry of a specified notice, or other date *e.g.*, "in any event not later than the —— day of ——" he should, it is submitted, so state in plain terms, but it does not seem right to make such a date of the essence of the contract by a general condition.

(2) Whilst under an open contract a vendor may possibly have to wait until a substantial period has elapsed before serving a notice calling on the purchaser to complete within a specified and reasonable period, (*b*) the Law Society's Condition does appear to enable the vendor to serve on a

(*b*) It is submitted that the judicial dicta to this effect may be misleading. If immediately after the completion date the vendor gives to the purchaser a notice calling on him to complete within a specified period, and the court would not itself have given the purchaser any longer period in which to complete if called upon to fix that period immediately after the completion date it is difficult to accept the view that the vendor would be penalised for anticipating correctly the extent to which the purchaser was entitled to latitude and, in effect, issuing a timely warning to that effect. To give a purchaser a longer period of grace merely because the vendor had indicated that he requires completion within a reasonable time would certainly not be in accordance with the principles of equity. The test is not whether the notice was given too soon, but whether it was too short. That view does not conflict with any decision, though it does *appear* to conflict with views expressed in Williams on Vendor and Purchaser.

defaulting purchaser a notice immediately after the date fixed for completion provided that it gives the purchaser as long a period of grace as the court would have given him in proceedings by him for specific performance commenced after the date for completion. If that view is correct it is submitted that the revised Condition is in a very proper form for the reason indicated in the last few words of paragraph (1) above.

(3) If time were of the essence of the contract there would be no need normally to give a period of grace to the purchaser; but owing to the form of the revised Condition it is plain that even if by special condition *the date fixed for completion is declared to be of the essence of the contract*, or if owing to the nature of the property time would have been of the essence, the effect of the revised Condition is to make it essential that the vendor should give to the purchaser *at least* 21 days' notice before treating the deposit as forfeited and reselling. If time is or is made of the essence of the contract for the purpose of the date fixed for completion it seems most probable that the court would tend to hold that a 21 days' notice was sufficient; but in a case where it appeared that injustice would be caused to the purchaser by so holding, it is submitted that the court would not hesitate to hold that a longer notice was necessary : see the *Pedigree Stock Farm Case* above mentioned, and *Lennon* v. *Napper* (1802) 2 Sch. & Lef. at p. 684.

(4) Now that the Law Society's Condition requires the vendor to serve at least 21 days' (instead of 14 days') notice on the purchaser it is to be remembered that the normal date for completion (except in cases involving large sums or complicated titles) is about one month from exchange of contracts; and an extension of 21 days in such cases is a considerable period. It must not, therefore, be assumed that the purchaser can in normal cases be confident that the court will relieve him if he fails to comply with a 21 days' notice.

(5) If, however, the vendor has himself been dilatory or has been unable to comply speedily with reasonable requisitions or to take other necessary and proper steps, there is little doubt that unless a period of 21 days following the service of the notice is fully sufficient to enable the remaining steps to be taken, the notice will be ineffective. On such facts the purchaser could not be said to be in default at the date of the notice.

Despite the good fortune of the vendors who purported to rescind and yet recovered damages in *Harold Wood Brick Co. Ltd.*, v. *Ferris* [1935] 2 K.B. 198, a vendor intending to claim damages under Condition 36, after the expiry of the notice, should be careful not to state that he treats the contract as rescinded : see *Barber* v. *Wolfe* [1945] 1 All E.R. 399.

The moral appears to be that, unless the parties are willing to insert a special condition making time of the essence of Condition 36 and deleting the words " at least," a vendor should wait a considerable time before serving a notice under that Condition, or should select a fairly lengthy period, protesting meanwhile against the purchaser's delay. Nevertheless, where the parties have agreed that, say, a month is a sufficient period in which to complete a matter and the title has been satisfactorily deduced and the draft assurance agreed (even if not engrossed) by the date fixed for completion a purchaser should not assume that the court would regard a 21 days' notice as an unreasonably short period in such circumstances, even if the notice were served a day after completion, and time was not of the essence of the contract (*c*).

CONDITIONS 36 (4) and (5)

(Loss on Resale)

On a resale after service of an effective notice under Condition 36 (1) if the vendor sells at a reduced price, and thus incurs a loss, the purchaser is liable to pay to the vendor the amount of the loss (credit being given for any deposit) but if the vendor resells at a better price he keeps the deposit and also the profit on the resale—a very satisfactory result for the vendor, and one of which the defaulting purchaser should not complain. Whether the vendor sells at a profit or at a reduced price or attempts unsuccessfully to resell, the purchaser is liable to pay to the vendor his expenses in that connection, no credit being *expressly* given for the deposit. If there is a sale at a loss and credit is given (in full) for the deposit as above provided, *cadit quæstio*. If, however, the sale is at the same or a higher price, and the vendor claims the expenses of resale, or if the vendor seeks to recover the expenses of an attempted resale, it is very doubtful whether he can recover them without bringing into account the deposit : see Williams on Vendor and Purchaser, 4th ed., p. 1016, footnote (q).

(*c*) The concluding words are inserted because of the form of the Law Society's Condition. It is appreciated that where Condition 36 applies completion *on the date fixed for completion* cannot be of the essence of the contract.

The vendor is also entitled under Condition 36 (5) (b) to " compensation for any other loss or damage consequent upon the purchaser's default, including any loss of rents or profits."

Here again the Condition makes no mention of credit for the deposit, but if not credited in connection with a claim for loss by reason of diminution of price, it seems that the vendor would have to give credit for the deposit when claiming under this Condition : see *Howe* v. *Smith* (1884) 27 Ch.D. at p. 105 (*per* Fry L.J.); and *Essex* v. *Daniel* (1875) L.R. 10 C.P. at p. 554; *Icely* v. *Grew* (1836) 6 N. & M. 467. The former Condition allowed the vendor to recover only the expenses of an unsuccessful attempt to resell, but the revised Condition extends to the expenses of an actual resale. That seems reasonable, as the loss flows directly from the purchaser's default; but if the loss on resale and the expenses of any attempted and/or successful resale did not exceed the deposit it seems doubtful if the vendor could recover them.

CONDITIONS 36 (6) and 37

(Resale After Rescission)

These are new conditions designed to assist the vendor in effecting a resale after forfeiture of the purchaser's rights. Condition 37 enables the vendor to require the defaulting purchaser to remove any entry relating to the contract in any register (*e.g.*, as an estate contract in the Land Charges Register). The purchaser may, however, fail to effect such removal, and Condition 36 (6) purports to provide a means whereby a purchaser in good faith will obtain a good title without removal of the registered entry, and without any inquiry as to the vendor's right to resell, and notwithstanding that the vendor was not entitled to resell under Condition 36 whilst preserving the right of " any person indemnified," and not merely of the purchaser, to recover damages from the vendor if the resale were " unauthorised or improper or irregular." Whether upon the issue of an injunction restraining the vendor from proceeding to completion of the resale, this provision would be spent, or whether the court would consider that the sole right of the original purchaser was to recover damages, so that no such injunction could be granted, is a nice point which must be left to the court to decide. It is true that where a mortgagee exercises his power of sale by conveying the mortgaged property at a time when that power is not strictly exercisable the conveyance may give a good title to the purchaser; but the court could restrain by injunction any intended but improper sale; *Whitworth* v. *Rhodes*, 20 L.J.Ch. 105; *Rhodes* v. *Buckland*, 16 Beav. 212. However, where the mortgage provided that the

borrower's remedy should be in damages if the mortgagee sold without the agreed notice, an injunction was refused : *Prichard* v. *Wilson*, 10 Jur.(N.S.) 330; 11 L.T. 437. It may be that the provision in paragraph (6) of Condition 36 under which the purchaser is to have his remedy in damages against the vendor, coupled with the earlier provisions of that paragraph, would provide a similar result. It is not clear that any other person indemnified could sue the vendor for damages, *under this Condition*, there being no privity of contract.

CONDITIONS 38–40

(Notices and Interpretations)

The remaining Conditions are formal and do not call for comment.

It seems right before ending this article to say that no one comparing the new edition with the previous one can fail to appreciate the fact that the Law Society and Counsel have gone to very great pains to meet difficulties which have arisen out of the 1934 edition (1949 Revision). On the whole the new edition of the Law Society's Conditions, which have always been considered less harsh upon the purchaser than the National Conditions, hold the scales evenly between vendor and purchaser, so far as is practicable having regard to the inveterate practice of allowing a vendor whose title is seriously defective to escape liability in damages by the simple expedient of rescinding the contract, and leaving the purchaser to pay his own solicitor's costs. The contrast between contracts for the sale of land and other contracts in that respect has been emphasised by the late Mr. Cyprian Williams in his works on Contract of Sale of Land and Vendor and Purchaser.

(*To be continued*)

INQUIRIES OF LOCAL AUTHORITIES— THE NEW FORMS

By J. F. Garner, ll.m., Solicitor

As a result of discussions between representatives of the Law Society (*a*) and of the various local authority associations, new forms for use when making inquiries of local authorities in connection with transactions in land (*b*) have been introduced for use on and after October 1, 1953. The questions themselves are in many cases substantially different from their predecessors, but before these are discussed in detail a few preliminary points as to fees, etc., must first be disposed of.

The questions are divided into Part I and Part II. In Part I, all the questions will be answered for a comprehensive fee of 10s. (*bb*) (*plus* 2s. 6d. for each additional, contiguous, parcel of land covered by the same form, subject to a maximum additional fee of 30s.), but questions in Part II may or may not be included on the form as sent in, and the printed questions included will be answered at an additional fee of 1s. each (no further charge for extra parcels of land). Further, if additional questions are added by the inquirer to Part II, an extra fee of 2s. 6d. per question is chargeable; the clerk of the council or town clerk to whom the form is addressed is not obliged to answer these extra questions, but if he does not do so the 2s. 6d. paid for each such question should be returned.

This new system for fees should have a salutary effect for several reasons :

(a) the fees will now more nearly represent the cost of ascertaining the information desired, and therefore solicitors should be entitled to prompt and full replies to their inquiries —in most cases they obtained such replies to the old forms, but in a few instances ready co-operation seems to have been lacking;

(b) in future inquiring solicitors will have to complete the forms with a little more care and thought than heretofore; unnecessary questions should not be asked, but the special

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(*a*) It is by courtesy of the Law Society, who own the copyright, that the writer has been permitted to quote from these forms. The forms are printed in the *Law Society's Gazette* for Sept., 1953, at p. 361.

(*b*) Either independently of, or accompanying, a search in the local land charges register.

(*bb*) 7s. 6d. in the case of enquiries of county councils.

features of the particular transaction should be thought out, so that adequate and essential "extras" in Part II may be drafted;

(c) as the forms and payment of fees have been agreed by the local authority associations, there should in future be no arguments by the clerks to authorities refusing to answer reasonable questions covered in Part II.

The usual *caveat* appears on the form to the effect that neither the council nor any officer of the council shall be legally responsible for the replies given, but in practice this does not cause any real hardship. Different forms are printed for county boroughs (Con. 29C), county councils (Con. 29B), and borough or district councils (Con. 29A), but new forms have not yet been prepared for the London County Council and the metropolitan boroughs. All the forms are available from the Solicitors' Law Stationery Society, Ltd.

For convenience, in this article it is proposed to comment only on the county borough form (Con. 29C), as being the form which includes all the questions on the other forms; the remarks will apply, *mutatis mutandis*, equally to the corresponding questions on the other forms.

QUESTIONS IN PART I

1. (A) Are the highways (including footpaths) known as . . . abutting on the property maintained at the public expense?

(B) If not, please state whether the council have passed any resolution to make them up at the cost of the frontagers.

This follows very closely a corresponding question in the old form, except that the second limb of the query has been clarified and stated in a more positive form, and the name(s) of the street has to be given, unless a plan is supplied in duplicate.

2. Has any order, draft order or scheme made under the Trunk Roads Act, 1936, the Trunk Roads Act, 1946, or the Special Roads Act, 1949, which may affect the property, been notified to the council?

This new inquiry was suggested in the report of the Local Land Charges Committee (*c*), and if an inquirer obtains an affirmative reply to the question, he should follow it up by calling at the council offices and examining the order, etc., and inquiring as to its probable effect on the property. Other road proposals, not affecting trunk or special roads, will be disclosed either on an examination of the development plan, or in reply to question 12 or 13 (below).

(*c*) Cmd. 8440; see p. 65, Appendix, para. 14.

3. (A) Is the property controlled land within the meaning of the First Schedule to the Public Utilities Street Works Act, 1950?

(B) If so, have the council authorised or have they under consideration an application to authorise any undertakers to execute works on, under or affecting any property in pursuance of that Act?

This new inquiry has been necessitated by the passing of the Act of 1950 referred to, but it is surprising that the words "or any part thereof" were not included after the opening words, "is the property," as it is extremely unlikely that the whole of the property which is the subject of the particular transaction will be controlled land. "Controlled land" is defined (see Act of 1950, First Schedule, para. 1 (1)) as meaning "land abutting on a street which is a maintainable highway or prospectively a maintainable highway (*d*) (in whatsoever use the land is for the time being, not excepting use as or as part of a garden or pleasure ground or the curtilage of a building (*e*)), being land which either—

(a) belongs to the street authority and is for the time being held by them, or capable of being immediately appropriated by them, for road purposes; or

(b) is the subject of a subsisting authorisation of compulsory acquisition by them (*f*) given with a view to their holding it for road purposes; or

(c) lies between the boundary of the street and an improvement line prescribed under section 33 of the Public Health Act, 1925, or under that section as applied by any other enactment, or under any corresponding provision in a special enactment (*g*).

Most cases of "controlled land" of an interest to a prospective purchaser will fall within case (c) (*h*); if an affirmative reply to the question is received, further inquiry should be made, as building on controlled land will in most circumstances be impracticable.

4. Are there any outstanding notices (whether statutory or informal) which have been issued by the council other than

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(*d*) *i.e.*, a private street which has been declared by the local highway authority to be a prospectively maintainable highway. Any such declaration is registrable in the local land charges register: Act of 1950, Second Schedule.

(*e*) Land incumbered by buildings or erections, other than "fences, fence-walls, gates, posts, hoardings or other similar structures or erections," is expressly excluded from the definition: para. 1 (2).

(*f*) Any such case would normally be disclosed by an answer to question 19 (below).

(*g*) "Special enactment" means "any enactment other than a public general enactment": Act of 1950, s. 39 (1).

(*h*) Even in this case the inquirer should have been put on his guard apart from this question, as improvement lines are registrable in the local land charges register.

notices shown in the official certificate of search? If so, please give particulars thereof.

This question repeats one used in the old form, but now makes it clear that the query includes informal notices. Most public health departments send an extra-statutory warning, or "intimation notice," advising the owner or occupier concerned that statutory action may be taken (*i*) if certain defects are not rectified. It seems reasonable that these matters should be disclosed to an intending purchaser, but there is a certain danger in their disclosure (from the point of view of the local authority), as such informal notices are customarily issued by an officer without reference to the local authority, and they therefore may not in all cases follow his advice and eventually take the statutory action recommended (*k*).

5. Is there a public sewer within 100 ft. of the property, physically available to serve it by gravity?

This question, which is again subject to the proviso that "it will be answered unless that would necessitate an inspection by the council's agents," follows a question in the old form, but by implication clarifies the meaning of "available" as used in the question. It should also be remembered that a local authority cannot insist (*l*) on a private individual giving another person a right to drain through his land for the purpose of connecting to a public sewer (*m*); further inquiry as to the exact location of the public sewer (*n*) should therefore be made in any case of anticipated difficulty. It is surprising that this question did not also inquire whether there was a public sewer in or under the property; the point should be covered by an "extra" inquiry under Part II.

6. Is there any enactment, statutory scheme or order relating to combined drains, or any agreement, within the meaning of section 24 of the Public Health Act, 1936, applying to the property?

This question is in identical terms to the question included in the old forms. The liability of a private owner in respect of a

(*i*) *e.g.*, under the "nuisance clauses" of the Public Health Act, 1936, under the Housing Act, 1936, s. 9, the Factories Act, 1937, ss. 1–7, or under the Food and Drugs Act, 1938, s. 13.

(*k*) There may be good legal reasons why such action should not be taken, which do not become apparent until the case is examined by the council's legal staff prior to the particular committee or council meeting. However, this is essentially a domestic matter which each local authority should consider for itself.

(*l*) This is so, even if the authority are exercising their rights to make the communication to the public sewer themselves, under the Public Health Act, 1936, s. 36: *Wood* v. *Ealing Tenants Ltd.*, [1907] 2 K.B. 390.

(*m*) Their compulsory powers under the Public Health Act, 1936, s. 15, are confined to the construction of a public sewer.

(*n*) Normally, by inspection of the sewer map deposited under the Public Health Act, 1936, s. 32.

length of sewer to which section 24 applies (see section 24 (4)) may be considerable, and it is therefore important that the local authority should be encouraged to give their views on the case as definitely as possible; the wary clerk will, however, ensure that his answer whilst explaining the nature of the drainage system in question, does not commit his council on the position under section 24 (*o*).

7. Has the property been registered as decontrolled in the register kept by the local authority?

This repeats a question in the old form, and the footnote pointing out that the question may still be material, has also been retained.

8. Have any entries been made in the registers kept under the Furnished Houses (Rent Control) Act, 1946, and the Landlord and Tenant (Rent Control) Act, 1949, in respect of the property?

This new question is obviously a necessary one, and inclusion was recommended by the Local Land Charges Committee (*p*). The question will be answered simply "Yes" or "No" (*q*); the inquirer obtaining an affirmative reply will then have to search the registers concerned (*r*).

9. Have the council authorised any proceedings in respect of an infringement of the building by-laws?

This new inquiry will normally be important only in a case of a new building, one in respect of which there has been recent extensions or alterations, or where there has recently been a "material change of user" within the meaning of section 62 of the Public Health Act, 1936, and the relevant by-laws, as the normal time limit of six months to summary proceedings (*s*) will apply. Liability is normally on the building owner; consequently a purchaser may "buy" a prosecution under the by-laws in respect of some infringement of which he may be ignorant. Inquirers should not request a "habitation certificate" to be furnished, as these cannot (and should not) be issued under the by-laws.

10. Has any enforcement notice under the Town and Country Planning Act, 1947, been authorised by the council for service, but not yet registered?

(*o*) The question whether or not s. 24 applies is often extremely complicated: see the present author's "Law of Sewers and Drains," at pp. 53 *et seq.*, and "Private Conveyancing and Public Sewers," in Volume 16 of this Journal, at p. 189.

(*p*) Cmd. 8440, para. 30, on p. 71.

(*q*) See footnote at the bottom of the printed form.

(*r*) Inspection of registers is free, but the prescribed fee for a certified copy of an entry in the register is 1s.; Act of 1946, s. 11, Act of 1949, s. 5 (4), and Furnished Houses (Rent Control) Regulations, 1946, reg. 12.

(*s*) Magistrates Courts Act, 1952, s. 104.

Presumably this new inquiry has been introduced owing to the importance of these notices; once an enforcement notice is served, it becomes registrable in the local land charges register. Obviously an inquirer will appreciate this information, but the logic of including this matter in the inquiries (and those in question 16, below), and not similar inchoate matters (such as, *e.g.*, a resolution to make a demolition order under section 11 of the Housing Act, 1936), is not equally clear. Clerks to district councils will not, of course, answer this question unless the power to take enforcement action under section 23 of the 1947 Act has been delegated to their council (*t*).

11. If there was an operative planning scheme in force prior to July 1, 1948, is the property affected by any of the matters (relating to the continuance in force of certain matters under the Town and Country Planning Act, 1932) referred to in paragraph 7 of the Tenth Schedule to the Town and Country Planning Act, 1947?

This question repeats, slightly re-drafted, a question in the old form; it does not seem to be really necessary, as all such matters should be registered in Part III (c) of the local land charges register.

12. (A) Has the Minister approved a Development Plan which includes the property?

(B) If not, is the property included in any proposals approved by or on behalf of the council or any joint planning board for inclusion in a Development Plan?

(C) If the answer to (A) or (B) is "yes," please specify whether the Development Plan, the proposals so approved for inclusion in the Development Plan or any proposals for alterations or additions to any Development Plan—

(i) designate the property as subject to compulsory acquisition;

(ii) indicate the primary use for the area in which the property is situated, and, if so, what that use is;

(iii) include any other matter which specifically affects the property. If so, please give short particulars thereof.

This is a re-drafted and obviously improved version of the question appearing in the old forms; solicitors using the forms should not get into the habit of regarding the answers obtained to this question as being an adequate substitute in all cases for an inspection of the Development Plan itself; it is suggested that such an inspection should be undertaken in every case where the answer to question (C) (iii) is in the affirmative.

(*t*) On this subject see also "The life of an Enforcement Notice," at [1953] J.P.L. 520.

13. Have any proposals (other than such as are referred to in inquiry 12 above), for the improvement, widening, alteration or construction of any road been approved by the council, which are likely to affect the property?

This seeks the same information regarding an ordinary road as that desired in respect of a trunk road or special road in question 2 (above). The question is new, having been suggested by the Local Land Charges Committee (*u*).

14. Are there any, and if so, what, entries relating to the property in the register kept under section 14 (5) of the Town and Country Planning Act, 1947?

This repeats a question in the old form; inspection of this register will not often be necessary.

15. Is there in force any direction referred to in Article 4 of the Town and Country Planning General Development Order, 1950 (relating to the restriction of permission to develop), which may affect the property?

It is submitted that if such directions relate to part only of the area of the local authority maintaining the local land charges register they should be registered in that register; if, however, the directions apply to the whole of that area, they will not be so registrable (*a*).

16. Have the council made an order, or passed any resolution for the making of an order, under sections 21, 26, 28 or 29 of the Town and Country Planning Act, 1947, in relation to the property?

The only justification for including this question seems to be that these orders will not take effect unless and until they are confirmed by the Minister (*b*); but once they have so become effective, they are registrable in the local land charges register.

17. Has compensation in respect of the property been paid by the council under section 20 of the Town and Country Planning Act, 1947?

It would not seem that this inquiry is really necessary, provided question 14 is fully answered and followed up as necessary: see also para. 9, on p. 64, of the Report of the Local Land Charges Committee, although it is not agreed that payments of compensation will necessarily be recorded in the section 14 (planning) register, as seems to be contemplated by the Committee (*c*).

(*u*) Cmd. 1884, para. 13, on p. 65.

(*a*) See Land Charges Act, 1925, s. 15 (7) (b) (i), as amended by the Law of Property (Amendment) Act, 1926.

(*b*) See s. 21 (1) (proviso), s. 26 (1) (proviso), s. 28 (3) and s. 29 (3).

(*c*) See the Town and Country Planning (General Development) Order, 1950, art. 12 (1).

18. (A) Are there any entries relating to the property in the register maintained by the council under the Town and Country Planning (Control of Advertisements) Regulations, 1948?

(B) Is there any notice served under Regulation 8 of such Regulations outstanding in respect of the property?

(C) Has any order been made or have the council passed a resolution to make an order defining the area in which the property is situated as an area of special control under Regulation 10 of such Regulations?

These new questions are obviously desirable, although they might well be struck out in cases where, as with ordinary residential property, the inquirer will not be concerned with advertising. The question relating to challenge notices under reg. 8 is particularly pertinent at the present time, as many local planning authorities (having made their development plans, and the 3-year period of grace under the Advertisements Regulations having expired) are now, for the first time, vigorously enforcing the Advertisements Regulations. An "order of special control" which relates to part only of the area of the registration authority will, it is submitted, be registrable in the local land charges register (*d*).

19. Have the council made any order (whether or not confirmed by the appropriate Minister), or have the council passed any resolution for the compulsory acquisition of the property?

It is suggested that the words "or of any part thereof" should be added at the end of this question. It will be remembered that the Local Land Charges Committee recommended that compulsory purchase orders should be registered in the local land charges register when made (*e*); if and until that recommendation is implemented in legislation, the present inquiry (a repetition of a question in the old form) is obviously most necessary.

Questions in Part II (*f*)

20. If the New Streets Act, 1951, applies, how have the council dealt with the property thereunder?

A printed note explains that the inquiry will not apply where the street has been adopted; it is also suggested that the question need be included (*g*) only if it is obvious that the building was

(*d*) *Cf.* observations on question 15, above.
(*e*) Cmd. 1884, para. 21, on p. 12.
(*f*) *i.e.*, "optional" questions for which an extra fee of 1s. *each* is payable.
(*g*) The Act applies in the case of rural districts only to those to which it has been extended by order of the county council. The county council's form (Con. 29D) is appropriately worded to ascertain whether such an order has been made.

erected subsequent to October 1, 1951, the date when the Act came into operation. Where the Act applies, the local authority will require, within one month of the passing of plans for the building under the building by-laws, the estimated cost of private street works apportioned to the building frontage, to be paid or secured to the satisfaction of the authority. There are, however, many cases (*h*) where a particular building will be either automatically exempt, or may be exempted by notice served by the local authority, and the answer to this question should elucidate the position. A notice served under section 2 of the Act, requiring payment or security, is not registrable as a local land charge, as the liability does not run with the land, but any action taken under the 1951 Act does not affect the position under the "appropriate private street works code" (*i*), and when the street works are eventually carried out by the local authority, the usual expenses collection machinery will apply, allowance being given for any advance payments, etc., made under the 1951 Act.

21. Has compensation been paid by the council in regard to the property in respect of any improvement lines prescribed under sections 33 or 34 of the Public Health Act, 1925?

In the few cases where such lines have been prescribed, it will clearly be necessary to obtain this information.

22. Has any public path (*k*) or road used as a public path over the property been shown in a draft, provisional or definitive map, whichever may be the later, prepared under Part IV of the National Parks and Access to the Countryside Act, 1949?

A copy of each type of these maps must be available for inspection in at least one place (usually the local council offices) in each county district within a county area, and in most cases inspection will be desirable (*l*); in any event, this question will not be answered unless a plan in duplicate is supplied by the inquirer.

23. (A) Has the discharge of trade effluent from the premises into the sewers of the council been permitted?

(B) A reference to any agreement, consent or refusal under the Public Health (Drainage of Trade Premises) Act, 1937, or otherwise would be appreciated.

This question repeats one appearing in the old form; as pointed out in a note on the printed form, it obviously need be asked only in respect of trade premises.

(*h*) See s. 1 (3) of the Act.

(*i*) *i.e.*, the Public Health Act, 1875, s. 150, the Private Street Works Act, 1892, or corresponding local legislation, as the case may be.

(*k*) This expression is defined in the National Parks and Access to the Countryside Act, 1949, s. 27 (6).

(*l*) See the present writer's article "Additional Inquiries before Contract," at 16 Conv. p. 116.

24. Is any building on the property included in any list of buildings of special architectural or historic interest supplemental to the lists for which provision is made by section 30 of the Town and Country Planning Act, 1947?

Inclusion in the "statutory" lists would, of course, be revealed by a local land charge search, but these supplemental lists have no statutory authority. On the other hand inclusion of a building in the supplemental lists may well influence the local planning authority on an application for permission to carry out alterations or extensions, etc., and the information required in the question may therefore be important; the question was suggested in the Report of the Local Land Charges Committee (*m*). It is suggested that this inquiry should be included in any case of doubt, especially in the older towns, where the compilers of the lists have been particularly generous in their interpretation of the expression "special architectural or historic interest."

25. Has any order under section 87 of the National Parks and Access to the Countryside Act, 1949, been made relating to an area which includes the property?

This question, recommended by the Local Land Charges Committee (*n*), will obviously be of importance where such an order exists; it should be included, it is suggested, wherever the property is situated in any pleasant part of the country. There is no definition of the expression "area of outstanding natural beauty," in the 1949 Act, and such an area may be of any size; obviously inquirers must err on the cautious side, but it will certainly not be necessary to include this query in the great majority of cases.

"Extra" Questions (*o*)

For suggestions as to the subjects that should be covered by "extra" questions in appropriate cases, the reader is referred to the present writer's former article "Additional Inquiries before Contract" (*p*). In particular, an inquiry will have to be drafted where, by reason of the special nature of the premises (either as to its use or mode of construction, etc.), some consent under a statutory control is necessary (*q*). Other matters that may be of consequence in particular cases include agreements by the owner to pay rates (in lieu of the occupier) under section 11 of the Rating and Valuation Act, 1925 (*r*), and information as to

(*m*) Cmd. 1884, para. 10, on p. 64.
(*n*) See Cmd. 1884, para. 30, on p. 17.
(*o*) *i.e.*, those questions added by the inquirer, for which an extra fee of 2s. 6d. each is payable.
(*p*) 16 Conv. 109; as to public sewers, see p. 112.
(*q*) See in particular, the article cited at p. 113.
(*r*) These agreements are binding (until determined) on subsequent owners.

street names and numbering. In drafting these "extra" questions, it is suggested that the inquirer should be careful to confine himself to matters which will (or should) be within the knowledge and competence of the authority to whom the inquiries are addressed, and to matters of information as to facts (*s*), and also should include extra questions only when these are really necessary and the information is not readily available from some other source, such as the inquirer's vendor, or the local land charges register.

(*s*) Questions as to the future policy of the local authority concerned, except in so far as this has been definitely formulated, should not be asked. The clerk to an authority, for example, should not be expected to answer a question as to whether his council are "contemplating" or "considering" taking certain action in respect of the property; question 3 (b) above is really aimed at ascertaining whether an application has been received, as the council in practice would probably grant most such applications.

THE FINANCE ACT, 1953

By Desmond Miller, of the Inner Temple, Barrister-at-Law.

Income Tax and Surtax. The standard rate of income tax for the year of assessment 1953–54 is reduced from 9s. 6d. to 9s. in the £. The rates of surtax remain unchanged. (Sections 12 and 13.)

Reduced Rate Relief. Section 220 of the Income Tax Act of 1952 is amended in the following respects :—

on the first £100 tax will be payable at 2s. 6d. in the £,
on the next £150 tax will be payable at 5s. in the £,
on the next £150 tax will be payable at 7s. in the £.

The corresponding figures for the year of assessment 1952–53 were : 3s., 5s. 6d., and 7s. 6d. respectively. (Section 12 (2).)

Old Age Relief. By amendment to section 211 of the Income Tax Act, 1952, the income limit for the full relief is increased from £500 to £600, the amount of the relief remaining unchanged at two-ninths of the net statutory income. (Section 14 (1).)

Child Allowance. By amendment to section 212 of the Income Tax Act, 1952, the amount of the emoluments which a child undergoing training may receive without prejudice to the parents' right to child allowance is increased from £26 to £52 per annum. (Section 14 (2).)

Allowance in respect of Dependent Relatives, Housekeepers, and Persons employed to take charge of children.

By amendment to sections 214, 215, 216 and 218 of the Income Tax Act, 1952, the relief in these cases is increased from £50 to £60 per annum with, in the case of dependent relatives, an increase in the upper limit of the personal income (of the relative) from £135 to £145 per annum. (Section 14 (3).)

Relief where claimant dependent on Services of Daughter. By amendment to section 217 of the Income Tax Act, 1952, the relief given to a claimant who, by reason of age or infirmity, depends upon the services of a daughter resident with him is increased from £25 to £40 per annum. (Section 14 (4).)

Adjustment of General Tax Liability by reference to Business Losses, etc. (*Section 15.*) There are two material amendments to the substantive provisions granting relief for losses, now contained in section 341 *et seq.* of the Income Tax Act, 1952, both having their origin in the Report of the Committee on the Taxation of Trading Profits (Cmd. 8189 of 1951). The first is that from the year of assessment 1953–54 onwards, relief is to be available under section 341 (*supra*) in respect of loss sustained in the last preceding year in any trade, profession, employment or vocation, provided that the trade, etc., in which the loss occurred is still carried on by the claimant during the year for which the claim is made, and further provided that such loss has not already been relieved, under section 341 or otherwise. Relief under the present provision (if claimed) is to be given in priority to any relief available under section 341, in respect of loss sustained during the year in which such relief is claimed.

The net effect of the section is succinctly summarised in the Report above referred to as a measure under which "a business loss can be carried forward and set against non-business profits for one year and one year only."

The second is that a right of appeal to the High Court from decisions of the Commissioners of Inland Revenue under section 341 (*supra*) is now available for the year 1953–54 and subsequent years of assessment, in all respects similar to the appeal against assessment made under Schedule D.

The section further provides for the order in which loss relieved under section 341 is to be set off against other income of the claimant; in this it gives statutory effect to the existing practice of the Revenue. In the result, any adjustment made under section 341 for the year 1953–54 or subsequent years is to be made by treating the loss, in the first instance, as reducing the individual's earned income and only if that is insufficient for the purpose, his unearned income. In the case of husband and wife, the relief is given against the joint income, first against the earned and then the unearned income of the spouse sustaining the loss, and next against the earned or unearned income of the other spouse, provided, however, that in this case, the spouse who sustained the loss in question may limit his or her claim under section 341 by reference to his or her own aggregate income.

Restoration in amount of Initial Allowances. (*Section* 16.) Initial allowances in respect of capital expenditure incurred in relation to industrial buildings, plant and machinery and mines oil wells, etc., were suspended by section 20 of the Finance Act,

1951, in relation to expenditure incurred on or after April 6, 1952; as re-enacted, the suspensory provisions are contained in section 265 (7) (Industrial Buildings), section 279 (5) (Machinery and Plant) and section 306 (Mines, Oil wells, etc.) of the Income Tax Act, 1952. The allowances are restored as respects expenditure incurred on or after April 15, 1953, in the case of industrial buildings, at the old rate of 10 per cent., in the case of machinery and plant, at the rate of 20 per cent. (instead of 40 per cent. existing immediately prior to suspension of the allowance) and, in the case of mines and oil wells, at the rate of 40 per cent. in lieu of the previous rate of 10 per cent.

As regards ships, special provision was made by section 20 of the Finance Act, 1951, which secured the initial allowance in the case of expenditure on ships actually under construction on April 10, 1951, or incurred pursuant to a contract for construction (of such ships or engines therefor) entered into not later than that date. This position is preserved and in relation to such expenditure the initial allowance remains at 40 per cent.; apart from the foregoing, expenditure on the provision of a ship incurred on or after April 15, 1953, is to rank for initial allowance at the rate of 20 per cent. However, expenditure incurred pursuant to a contract for the sale of a ship where (i) the price is payable before April 15, 1953, but the ship is not delivered until after that date, or (ii) where the price is payable in instalments some of which are payable before April 15, 1953, and some after that date (in so far as incurred after April 15, 1952, but before April 15, 1953), is to be treated for this purpose as if incurred on the latter date.

Capital allowances — New Classes of Industrial Building. (*Section* 17.) Section 271 of the Income Tax Act, 1952, which defines the classes of industrial buildings and structures which qualify for capital allowances is amended by the addition of a new class, from the year of assessment 1953–54, *viz.*, buildings or structures used, "for the purposes of a trade consisting in the catching or taking of fish or shell-fish."

Allowances for Expenditure on Repair of Buildings. (*Section* 18.) The section ensures that a double allowance is not obtained in respect of the same expenditure, as capital expenditure on an industrial building under Part X of the Income Tax Act, 1952, and by way of maintenance claim (under Schedule A) under section 101 of the same Act. Such expenditure, if not admissible as a deduction in computing the profits of the trade in question, is, subject of course to the normal tests of eligibility, to rank for

capital allowances under Part X of the Act of 1952. However, if such expenditure has been included in a maintenance claim, the amount available for capital allowances under Part X (*supra*) is to be reduced to the extent of the amount on which such relief has been given.

Changes in Ownership of Trade. (*Section* 19.) Prior to April 6, 1953, the provisions regulating assessment in the case of partnership changes and successions were contained in Rules 9 and 11 of the rules applicable to Cases I and II of Schedule D of the Income Tax Act, 1918, as re-enacted by sections 145 and 146 of the Income Tax Act, 1952. These provisions are repealed by section 35 and Part III of the Third Schedule to the Finance Act, 1953, and replaced, from April 6, 1953 (as respects changes in partnership occurring after that date) by section 19, *ibid.*

The position prior to April 6, 1953, was briefly that on a change occurring in the composition of a partnership, the assessments upon the profits of that partnership were to be made as if no such change had taken place. This rule was, however, subject to the proviso that, by agreement between all partners, including in the term both outgoing and incoming partners, adjustment to the assessments could be claimed on the basis that the partnership trade or business had been discontinued at the effective date of change. In this state of the law, the Committee on the Taxation of Trading Profits took the view first that to secure the agreement of all partners to the exercise of such option was a matter of difficulty since there was obviously the possibility of a conflict of interests, and secondly, that the existence of the option in its then form afforded considerable scope for tax avoidance in cases where the profits of the partnership fluctuated. For the latter conclusion, they referred to the decision in *Osler* v. *Hall & Co.* (1933) 1 K.B. 720. That case was concerned with a partnership in whose constitution there were changes on March 21, 1929, and March 20, 1930. Upon the first change, no notice claiming discontinuance was given, but, on the occasion of the second change, such notice was given. Upon an application of the discontinuance provisions, now contained in section 130 of the Income Tax Act, 1952, the Crown sought to raise an additional assessment for the year 1928–29 in an amount equal to the excess of the actual profits of that year over the profits previously assessed. This additional assessment was made upon the firm which carried on the partnership business between the first and second changes, that is to say, from March 21, 1929, to March 20, 1930, but this assessment was discharged since, as it was held, assessment never having been made on that firm for

that period an additional assessment could not be made under the provisions of section 130 (*supra*).

There was one other matter to which the Committee adverted, namely that where election was made for discontinuance, there was no method by which the continuing partners could obtain relief for loss sustained or capital allowances unexhausted, prior to the date of discontinuance or notional discontinuance.

The Committee, at paragraph 72 of their Report (Cmd. 8189 of 1951), therefore made (inter alia) the following recommendations:—

> " (i) On a change in the constitution of a partnership the cessation and commencement provisions to be applied unless all those who were members of the partnership both before and after the change elect that the assessments should continue to be made on the normal preceding year basis.
>
> " (ii) Whether or not the cessation provisions apply on a change in partnership, the continuing partners should be entitled to carry forward their share of any loss or capital allowances for which relief has not already been given.
>
> " (iii) Any additional liability arising from the application of the cessation provisions, either on the coming to an end of the business, or under sub-paragraph (i) above, should be enforceable on the persons who were members of the partnership during the relevant years, notwithstanding that in these years there may have been another change in partnership in relation to which the cessation provisions did not fall to be applied."

It is these recommendations which the section ostensibly seeks to implement.

Thus, by subsection (1), the position previously existing is completely reversed and a change in the persons carrying on any trade, profession or vocation is hereafter to result in the profits of that trade being determined upon the basis that it was discontinued at the effective date of change and a new trade then set up. This mandatory provision is, however, itself subject to the option afforded by subsection (3), which arises where, (i) there is a change in the constitution of the partnership, (ii) there is some continuity in the personnel, to the extent that at least one of the persons who was engaged in the trade before the change is also engaged therein after that change, and (iii) all partners before and all partners after agree, and signify their agreement by notice in writing to the Inspector within twelve months after the date of change. In these circumstances, if they exist, assessment upon the partnership profits

will continue to be made as if no change in the constitution had taken place.

In cases where the option is exercised, provision is made (by subsection (4) (a)) for the tax for the year of change (which is to be computed as if there had been no such change) to be apportioned between the partners constituting the firm before the date of change and those constituting the firm after that date, in such proportions "as may be just"; the procedure as to apportionments laid down by section 329 of the Income Tax Act, 1952, being applied for this purpose. Tax so apportioned is to be separately assessed and charged on the respective partners.

It will be seen that the *Osler* v. *Hall* decision (*supra*) could only apply to changes occurring subsequent to April 6, 1953, where advantage is taken of the option accorded by subsection (3) of section 19. However, in accordance with the views of the Committee on the Taxation of Trading Profits, steps have been taken to nullify the effect of that decision. Thus where (i) election is made for the continuing basis of assessment, and (ii) thereafter *but before the end of the year of assessment following that in which the change took place* there is a permanent discontinuance of the trade, or a change treated as such, then, on that discontinuance, section 130 of the Income Tax Act, 1952, is to apply to the period between the first and second changes as it would apply if the first change in the constitution of the partnership had not taken place. The result appears to be that in the circumstances postulated by the subsection, assessment or additional assessment may be made under section 130 (*supra*) upon the persons who were partners prior to the date of the first change.

Provision is also made, by subsection (2), which enables a partner who was engaged in the trade as such, both before and after an event treated for the purposes of section 19 as a permanent discontinuance of that trade to carry forward his share of loss unrelieved or the balance unexhausted of any capital allowance (for the purposes of the section to be treated as a loss sustained before the date of discontinuance) and to set this composite loss off against such partner's share in the profits accruing after the date of discontinuance.

It will be noted that any election which might have been made by a person who has died, may be made by his personal representatives and further, that a change in personal representatives or trustees who, as such, carry on a trade, is not to be treated as a change for the purposes of the section.

Payments between associated companies in respect of losses. (*Section* 20.) Where one company is subsidiary to another or both are subsidiaries to a third, payments by one to the other to make good a trading deficit suffered by the recipient, are to be treated as a deduction in computing the profits of the paying company and as a trading receipt in the hands of the recipient company. The section, therefore, effectively nullifies the decision in *Odhams Press, Ltd.* v. *Cook*, 23 T.C. 233.

The following conditions or restrictions on the making of subvention payments, as they are called, are to be noted:—

(i) The section applies only to a body corporate resident in the United Kingdom and carrying on a trade in whole or part within the United Kingdom.

(ii) One company must be subsidiary to the other, or both must be subsidiary to a third. The term " subsidiary " for this purpose is defined by section 42 of the Finance Act, 1938, and involves a holding of three-quarters or more of the ordinary share capital by the principal.

(iii) The payment must be made pursuant to an agreement, which may be general or *ad hoc*, and must be made in or before the year of assessment following the recipient company's accounting period, in which the loss was sustained.

(iv) As regards payments made pursuant to section 20 during the year of assessment 1953–54, the section is retrospective in effect, as regards the paying company's position, both for income tax and profits tax purposes.

(v) The section (by subsection (5)) provides the method of determining the amount of the deficit or surplus, as the case may be, the subject-matter of the subvention payment.

Unremittable Overseas Profits. (*Section* 21.) The section recognises the position which may arise under present-day trading conditions which result in profits or income " arising in a territory outside the United Kingdom " necessarily remaining in that territory, because of the action of the Government or Executive of that territory, or the impossibility of obtaining the requisite foreign currency. Where these conditions exist and the person chargeable to tax by reference to such profits cannot remit them to the United Kingdom for the reasons stated *and* has not realised the profits outside the territory (in question) for a consideration in sterling or for a consideration which he is not debarred from remitting to the United Kingdom, he may, at his option, claim

that such profits shall be omitted from assessment and charge of United Kingdom income tax, Profits Tax or Excess Profits Levy until they become remittable.

The provision relates to overseas income by reference to which the person in question is chargeable to income tax for 1952–53 or any later year, and notice exercising the option accorded to the taxpayer must be given before assessment, made by reference to the overseas income, has become final and conclusive.

Relief for Copyright Royalties. (*Section* 22.) The purpose of this section is to give the right to spread income, received in the form of royalty payments, to the authors of literary, dramatic musical or artistic works. Prior to the year 1953–54, such individuals could only claim relief in respect of lump sum payments received by them on the sale of copyright. Under this new provision, however, subject of course to the conditions contained in section 471 of the Income Tax Act, 1952, the author may claim to have royalties received by him during the two years following publication of the work in question, spread back over a period of two to three years, dependent upon the period during which he was engaged on the work.

Compulsory slaughter of Farm Animals: Election for the Herd Basis. (*Section* 23.) The section enables a farmer who receives compensation for the compulsory slaughter of a production herd to avoid assessment upon the amount of that compensation, as a trading receipt, by electing for assessment on the herd basis prescribed by section 473 and the Twentieth Schedule to the Income Tax Act, 1952.

The election for taxation treatment, on the herd basis pursuant to the section, must be made within twelve months after the end of the year of assessment for which the compensation is relevant, *i.e.*, in which the compensation would, were it not for the election, be brought into the computation of profits or gains.

The first year of assessment for which notice may be given is the year 1951–52 and, by subsection (6), such election may not be made, by force of the present provision, after the end of the year 1953–54.

Charge of Tax on sum applied outside U.K. in repaying certain loans. (*Section* 24.) Section 132 of the Income Tax Act, 1952, now contains the rules under which foreign securities or possessions are charged to United Kingdom tax; the measure of such charge is normally the full amount of the income arising abroad,

whether or not that income is remitted to this country. By subsection (2) of section 132, however, the benefit of the remittance basis is preserved, inter alia, in the case of a trade carried on abroad or of an employment, where the source of the remuneration is wholly abroad. Subsection (3) of section 132 sets out, in effect, the circumstances in which income is, for the purposes of Case V, to be treated as remitted to the United Kingdom.

In these circumstances, the courts had held, as long ago as 1936, in the well-known decision in *Hall* v. *Marians*, 18 T.C. 148, 19 T.C. 582, that an agreement for a loan made in the United Kingdom with provision that the loan should be repaid by transference to and settlement abroad (through the medium of banks) did not constitute a remittance payable in the United Kingdom, within section 132 (3) (*supra*), and upon this basis, the Revenue took the view that the decision could be utilised as a device whereby the payment of United Kingdom tax was avoided on what were, in effect, although not in law, remittances to this country. The present section is therefore directed to nullifying the decision in *Hall* v. *Marians*, and this it purports to do by amendment to subsection (3) of section 132 of the Income Tax Act, 1952. In the result, therefore, any income applied outside the United Kingdom by a person ordinarily resident in the United Kingdom in or towards satisfaction :

(i) of a debt for money lent to him in the United Kingdom or for interest on money so lent, or,

(ii) of a debt for money lent to him outside the United Kingdom and received in or brought to the United Kingdom, or,

(iii) of a debt incurred for satisfying in whole or in part a debt falling within sub-paragraph (i) or (ii) above,

is to be treated as received by that person in the United Kingdom, and for this purpose as a remittance payable in the United Kingdom within section 132 (3) (b) (*supra*). So far, therefore, the position is straightforward and effectively deals with the *Hall* v. *Marians* position.

Subsection (2) is presumably intended to extend the scope of the section. This subsection applies where a United Kingdom resident receives in or brings to the United Kingdom money lent to him abroad but where the debt so created has been wholly or partly satisfied before this is done. In these circumstances, subsection (1) (b) is to apply, *i.e.*, there is to be deemed to be a remission of the amount applied in satisfaction of the debt but the date of remission, for this purpose, is the date upon which the money is actually brought into or received in the United Kingdom.

Subsections (3) and (4) are directed at obvious alternatives which might be used to defeat subsections (1) and (2), for example, the deposit of moneys with the lender for the purpose of satisfying or reducing the debt by set-off or otherwise.

Subsection (5) grants a *locus poenitentiae*, hence the section is not to apply in relation to foreign income, applied in repayment of a loan made before April 15, 1953, or in satisfaction of a debt incurred to enable such loan to be repaid, provided the application takes place in either case before the end of the current fiscal year.

Postponement of Capital Allowances to secure Double Taxation Relief. (*Section* 25.) The section applies primarily to income assessable under Case I of Schedule D, which is also liable to foreign tax and in respect of which relief is available under Part XIII of the Income Tax Act, 1952. The inequity, as the Committee on the Taxation of Trading Profits noted, arises from the fact that capital allowances may not be given for the same trading period, in this country and in the foreign country in question. The resultant effect is (or may be) that in one year there is a large liability to foreign tax but little or no liability to United Kingdom tax and vice versa, and as Double Taxation Relief is restricted to relief on income which is taxed in this country and abroad for the corresponding year, there will, in the circumstances predicated, be little or no relief in the two relevant years, the trade is in effect losing all benefit from the allowance. The Committee therefore recommended that, " where it is shown that relief for double taxation is inadequate for any year of assessment by reason of capital allowances being given on different bases, in the United Kingdom and abroad, the owner of the business should be allowed to postpone the whole or part of any capital allowances to a subsequent year."

Broadly, the section carries into effect this recommendation.

Removal of Special Limit on Unilateral Relief for Double Taxation of Profits or Income. (*Section* 26.) Unilateral relief as accorded by section 348 of the Income Tax Act, 1952, was subject to a limitation upon the amount of the credit which it was said was not to exceed, in the case of Commonwealth territories, three-quarters, and in other cases, one-half of the aggregate amount of the United Kingdom taxes payable on the income in question. This restriction or limitation is now removed for the year of assessment 1953–54 and subsequent years.

Termination of Excess Profits Levy. (*Section* 27.) The section brings the Excess Profits Levy to an end on December 31, 1953. In view of the fact that there is no inter-relation between this tax and the Profits Tax, as there was between the Profits Tax and the war-time Excess Profits Tax, it will not be necessary to have any elaborate terminal or transitional provision such as followed the abolition of the Excess Profits Tax. An accounting period which overlaps December 31, 1953, is to be apportioned, if sufficient accounts are prepared by the company, for the period ended on that date in accordance with those accounts. In addition and as might be expected, there is a prohibition against spreading back into the period of charge expenses incurred after January 1, 1954.

Apart from the foregoing the section contains two amendments of substance to the existing Excess Profits Levy legislation, *viz.*:

(i) to section 56 of the Finance Act, 1952, relating to special allowances granted to companies whose business consists in the extraction of minerals, extending the extent of the relief with retrospective effect to the commencement of the period of charge of the Levy;

(ii) to section 52 of the Finance Act, 1952, bringing within the scope of the relief afforded by that section cases where the functions of the group, considered as a unit, consist *substantially* in the holding of investments.

Iron and Steel Companies—Profits Tax and Excess Profits Levy. (*Section* 28.) The section relates to the position created by the Iron and Steel Act, 1953, governing the conditions upon which Iron and Steel companies are to be returned to private ownership; it is of relevance only in the Profits Tax and Excess Profits Levy computations.

As to the Profits Tax, the section provides that where the Realisation Agency set up under the Act owns, directly or indirectly, the whole of the ordinary share capital of any Iron and Steel Company and the Treasury certify, pursuant to the section, that the distribution in question is made to facilitate the process of denationalisation, the following activities by any such company, which would normally affect its distributions for Profits Tax purposes, are to be disregarded in the Profits Tax computation :—

(i) a distribution by way of dividend or cash bonus,

(ii) a distribution of assets in kind, or,

(iii) the issue and redemption of fully-paid redeemable preference shares.

So far as the recipient of any such distribution is concerned, if an Iron or Steel company the provisions of the section are not to apply unless the company so elects.

As to the Levy, distributions of the Iron and Steel company's property or assets made pursuant to the Iron and Steel Act (*supra*), if certified by the Treasury, are to be treated as if made in cash by way of repayment of share capital; that is to say, they will reduce the standard profits of the distributing company. As a corollary, the recipient is to be deemed to have received such property or assets as if they were a sum of cash received in respect of an issue of share capital, with a corresponding increase of its standard profits.

Assessments in Isles of Scilly. (*Section* 29.) The Isles of Scilly are now included in an Income Tax division, and, as a consequence, a charge of Income Tax applies for the year of assessment 1953–54 and thereafter, and of Profits Tax, to profits earned after March 31, 1954; for this latter purpose, any accounting period overlapping this date is to be sub-divided into two parts, of which the chargeable accounting period is that commencing with April 1, 1954.

Extension of Power to accept property in satisfaction of Death Duties. (*Section* 30.) Under section 56 of the Finance (1909–10) Act, 1910, as amended by section 49 of the Finance Act, 1946, the Commissioners may in their discretion, on the application of a person liable to the duty, accept in satisfaction or part satisfaction thereof, any real or leasehold property. It will be remembered that the Chancellor of the Exchequer, in opening his Budget of the year 1946, anticipated that the power would thereafter be operated on a more substantial scale.

The present section relates to "objects," which the Commissioners are now authorised in their discretion to accept in satisfaction or part satisfaction of Estate Duty or settlement Estate Duties. The word "objects" is not defined, but the reference to section 40 (3) of the Finance Act, 1930, is clearly indicative that the meaning accorded by that subsection will be given to the word in its present context, namely, pictures, prints, books, manuscripts, works of art, scientific collections appearing to be of national, scientific, historic or artistic interest.

The conditions of acceptance (subject, of course, to the Commissioners' overriding discretion) are these:

(i) That the objects, at the relevant date are, or formerly were, kept in a building:

(a) accepted under section 56 of the Finance (1909–10) Act, 1910, in satisfaction or part satisfaction of duty, or
(b) owned by the Crown or by a Government Department, or
(c) scheduled under the Ancient Monuments Consolidation and Amendment Act, 1913, or
(d) if any interest therein is vested in the National Trust.

(ii) Where the Treasury consider it desirable that the objects should remain associated with the particular buildings.

It will be noted that the transfer of any such object or objects is franked from the payment of any Stamp Duties otherwise exigible.

Stamp Duties. (*Section* 31.) The section grants the following exemptions from Stamp Duties:

(i) To certain specified receipts given in connection with National Savings;
(ii) As from August 1, 1953, the provisions of Part VI of the Finance Act, 1947 (which double the rates of Stamp Duty chargeable under the heading of Conveyance or Transfer on Sale and Share Warrant and Stock Certificate to bearer) are not to apply to a conveyance or transfer on sale of new local authority stock (as defined) and the duty payable under section 115 of the Stamp Act, 1891 (relating to compositions for duty on transfers of such stock) is to be reduced in respect of any account delivered on behalf of a local authority.

Excess Profits Tax Post-War Refunds. (*Section* 32.) The Finance (No. 2) Act, 1945, provided for the payment of post-war refunds of the Excess Profits Tax subject to stringent conditions which were directed to ensuring that such refunds were employed for re-equipping and developing generally the business in respect of whose profits the tax had originally been exigible, or its successor. In view mainly of the passage of time, the present section provides that the giving of such an undertaking relative to the refund is no longer a condition prerequisite to the grant, and, further that any such undertaking given before July 31, 1953, is now inoperative.

THE LAW OF STAMP DUTIES

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I General Principles

Introductory

It is the object of this and other articles on the same subject which are intended to follow it to attempt to restate in narrative form those aspects of the law of stamp duties which most concern the student and practitioner. The leading textbooks on the subject follow the scheme of the Stamp Act, 1891, and deal with the various instruments to be stamped in alphabetical order giving the law in great detail.

Stamp duties are duties imposed by Act of Parliament on certain instruments which have legal effect. The common law imposes no stamp duties, and the whole law is thus statutory. Such duties were first imposed in England at the end of the seventeenth century. They are governed now primarily by the Stamp Duties Management Act, 1891, and the Stamp Act, 1891 (*a*), the latter imposing the duties and the former making numerous administrative provisions. These Acts are liable to be and have, in fact, been frequently amended and supplemented by the annual Finance Acts and occasional Revenue Acts. The duties imposed are of two kinds, fixed duties and *ad valorem* duties. For instance a fixed duty of 10s. is imposed upon a deed (*b*), and the fixed duty does not vary with the subject-matter of the deed; whereas an *ad valorem* duty varies in amount in some specified proportion to the amount or value of some obligation incurred or discharged or some property affected by the instrument in question. Thus *ad valorem* duty at the rate of £1 on every £50 of the consideration is (subject to exceptions) imposed on every conveyance on sale (*c*).

The Stamp Act, 1891, which is the more important of the two Acts above referred to, is divided into three parts. Part I contains the charging section (section 1) which charges instruments by reference to the First Schedule. The First Schedule contains an alphabetical and somewhat haphazard collection of instruments, and ends with a series of general exemptions. Part I also contains certain ancillary sections. Part II contains a series of sections

(*a*) 54 & 55 Vict. cc. 38 and 39.
(*b*) Stamp Act, 1891, (54 & 55 Vict. c. 39) Schedule.
(*c*) Stamp Act, 1891 (54 & 55 Vict. c. 39), Schedule, as amended by Finance (1909–10) Act, 1910 (10 Edw. 7, c. 8), s. 73, and Finance Act, 1947 (10 & 11 Geo. 6 c. 35), s. 52.

elucidating and supplementing the Schedule, arranged in the same order as the matters to which they refer are arranged in the Schedule. Part III contains miscellaneous provisions including the imposition of capital duty on companies.

Before going into the various duties it is necessary first to consider certain principles and administrative provisions affecting the matter.

Stamp duties imposed on documents

As will be seen, stamp duties (*d*) are paid by the affixing of a stamp either impressed or in some cases adhesive to the instrument required to be stamped. It follows that, if a legal transaction can be effected orally or by conduct only, no stamp duty is attracted, as there is nothing to which the stamp can be affixed. "The thing which is made liable to duty is an instrument (*e*)." Thus an oral contract, the transfer of chattels by delivery, and the deposit of title deeds as security for a loan, attract no stamp duty, but the same contract reduced to writing would (unless falling within one of the exemptions) attract a stamp as an agreement, and the transfer of the chattels by instrument on the sale thereof would attract duty as a conveyance on sale (*f*), and any memorandum accompanying the deposit of the title deeds would attract the appropriate duty as a mortgage (*g*).

Questions of difficulty may arise where a transaction is effected partly orally and partly in writing, or where the transaction is effected by words or conduct and is thereafter evidenced or given effect to by written instrument. The principle on which the former question is determined can be illustrated by the case of a contract where the offer is in writing and the acceptance oral or vice versa. In the former case there is no stamp as the offer by itself does not constitute an agreement. Thus, in the famous case of *Carlill* v. *Carbolic Smokeball Co.* (*h*), it was held that the advertisement offering £100 to any person contracting influenza after using one of the defendants' smokeballs did not require a stamp. On the other

(*d*) Other than Corporation Duty which is declared to be a stamp duty: Customs and Inland Revenue Act, 1885 (48 & 49 Vict. c. 51) s. 12.

(*e*) *Per* Lord Esher M.R. in *I. R. C.* v. *Angus* (1889) 23 Q.B.D. 579 at p. 589. It will be appreciated that many transactions can only be effected by instrument in writing—some only by deed. In some cases a requirement of writing has been imposed specifically for the protection of the Revenue, *e.g.*, transfers of shares and debentures: Companies Act, 1948, (11 & 12 Geo. 6, c. 38), s. 75; see *Re Greene* [1949] Ch. 333 at p. 339; transfers of units under unit trusts: Finance Act, 1946 (9 & 10 Geo. 6, c. 64), s. 56 (4); contracts of sea insurance: Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 93; and contract notes: Finance (1909–10) Act, 1910 (10 Edw. 7, c. 8), s. 78 (1).

(*f*) *Eastbourne Corpn.* v. *Att.-Gen.* [1904] A.C. 155 at p. 156.

(*g*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 86 (1) (e).

(*h*) [1892] 2 Q.B. 484; on appeal [1893] 1 Q.B. 256.

hand if an offer is made orally and is accepted in writing the acceptance concludes the contract and should be stamped (*l*).

Another and more difficult problem arises when parties enter into a transaction wholly orally and thereafter proceed to record or give effect to it in writing, as for instance when the terms of an oral agreement are embodied in a written memorandum or the terms of an oral transfer of property are recorded in a receipt for the purchase money. In certain cases the Stamp Act, 1891, expressly applies to such documents. Thus a memorandum of an agreement carries the same stamp as an agreement (*m*), and a memorandum under hand only relating to the deposit of title deeds is included in the definition of "equitable mortgage" (*n*). But there is no general provision that a document evidencing an oral (or unstamped written) transaction shall bear the same stamp as a written document effecting the same transaction would have borne. Indeed the court has rejected the contention that an instrument reciting the conveyance of property by an instrument itself not before the court and never presented for stamping (possibly because it was executed abroad and related to property abroad), should itself be stamped as a conveyance (*o*). But the courts have made some attempt to fill the gap left by the legislature. Thus in *Cohen and Moore* v. *I. R. C.* (*p*), parties had orally supplemented the funds subject to a settlement and had five weeks later executed an appointment of new trustees, scheduling the additional settled funds to the appointment and it was held that the appointment must bear settlement duty on the value of the additional funds. "I think," said Finlay J. (*q*), "that the transaction was really all one transaction, and that, being one transaction, the whole was recorded in the document [*i.e.*, the appointment of new trustees]—the only document which has been drawn up—which is the settlement." In enunciating this doctrine that where the oral transaction and the written evidence of it are all part of the same transaction, the written evidence shall be treated for stamp duty as the document effecting the transaction, Finlay J. relied on two earlier cases in which receipts for the purchase money of property sold were stamped as conveyances on sale (*r*). The authority of these receipt

(*l*) *Hegarty* v. *Milne* (1854) 14 C.B. 627.
(*m*) Stamp Act, 1891 (54 & 55 Vict. c. 39), Schedule: Agreement or any Memorandum of an Agreement.
(*n*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 86 (2).
(*o*) *International Power Co.* v. *I. R. C.* (1933) 12 A.T.C. 413 at p. 422.
(*p*) [1933] 2 K.B. 126.
(*q*) [1933] 2 K.B. 126 at pp. 137–8.
(*r*) *Horsfall* v. *Hey* (1848) 2 Ex. 778, and *Garnett* v. *I. R. C.* (1899) 81 L.T. 633.

cases is, however, affected by the decision of the Court of Appeal in *Fleetwood-Hesketh* v. *I. R. C.* (*s*), where a receipt was held liable to *ad valorem* duty as a memorandum of a contemporaneous contract for the sale of an equitable interest (*t*), the Court of Appeal being divided on the question whether it was a conveyance on sale, with the weight of the words used being somewhat against liability. The court was dealing with an appeal from Finlay J. who had held the receipt to be a conveyance on sale in reliance on the doctrine of "all one transaction," enunciated by him in *Cohen and Moore* v. *I. R. C.* (*u*).

The Court of Appeal seem to have relied on the same doctrine to support the assessment as an agreement. Whether this is so or not, it has been accepted and followed in two subsequent cases under which companies paying a dividend in specie and satisfying a reduction of capital in specie have been held liable for voluntary conveyance duty (*a*). The field seems to be in the possession of the Revenue; and in view of the size of the loophole in the law that would be revealed if it were not, it is not to be supposed that the Revenue will surrender it lightly, or submit to defeat, without procuring the introduction of amending legislation.

Another example of this difficulty occurs in the common case of a beneficiary under a will or trust agreeing to assign his interest and instructing the executor or trustee to vest it in some third party. If the assignment (whether voluntary or for consideration) is not effected by a document (*b*), the question arises whether the assent or other document by which the executor or trustee gives effect to the agreement by vesting the property in question direct in the assignee, attracts *ad valorem* duty as a voluntary conveyance or conveyance on sale, as the case may be. It is thought that the Revenue would claim duty in such a case, and in the case of a conveyance on sale their claim would be assisted both by the wide statutory definition of conveyance on sale which will be considered later (*c*), and by the decision in *G. H. R. Co.* v. *I. R. C.* (*d*), where it was held that an assent by executors to the

(*s*) [1936] 1 K.B. 351.

(*t*) It will be shown in a later article that under s. 59 of the Stamp Act, 1891 (54 & 55 Vict. c. 39), certain agreements for sale carry an *ad valorem* duty. A memorandum of an agreement is not expressly mentioned.

(*u*) [1933] 2 K.B. 126 at pp. 137–8.

(*a*) *Associated British Engineering* v. *I. R. C.* [1941] 1 K.B. 15; *Wigan Coal and Iron Co.* v. *I. R. C.* [1945] 1 All E. R. 392. It should be noted that the judge in each of these cases used language which suggested that if he had thought the dividend, resolution or the order confirming the reduction had created a trust in favour of the shareholders he might have reached a different conclusion.

(*b*) It will be shown later in this article that only one *ad valorem* stamp is charged on a single transaction effected by more than one instrument.

(*c*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 54.

(*d*) [1943] K.B. 303.

vesting of property in a purchaser from the deceased (to whom no conveyance was made during his lifetime), attracted duty as a conveyance on sale. There is likewise a very wide statutory definition of voluntary conveyance (*e*), but it is qualified by a provision that the section in question does not apply (inter alia) to a conveyance or transfer under which no beneficial interest passes (*f*), and it seems that the task of the Revenue in claiming duty would be correspondingly harder. It is suggested that they would be forced to rely on the doctrine of "all one transaction" above referred to (*g*).

Method of Stamping—Impressed and Adhesive Stamps

Stamps are of two main kinds, impressed and adhesive. The impressed stamp is impressed on the instrument by dies in the possession of the Revenue, and can thus only be affixed if the instrument or the paper on which it is to be written is itself presented to the revenue for stamping. Most adhesive stamps can be purchased at the post office and stuck on the instrument in the same way as on a letter. Although, as will be seen, adhesive stamps may not be affixed to an instrument after execution, it is in fact virtually impossible to detect it if this is done. Accordingly adhesive stamps are in general permitted only where the amount of the duty is small.

Section 2 of the Stamp Act, 1891 (*h*) provides that except where express provision is made to the contrary stamp duties are to be denoted by impressed stamps only. There is only a very limited class of cases in which adhesive stamps are permitted but not obligatory, the most important of which are agreements under hand only (*l*); bills of exchange, etc., payable on demand or sight or within three days thereafter (including cheques) (*m*); receipts (*n*); policies of assurance other than sea and life insurance (*o*); and leases of dwelling-houses or parts of dwelling-houses for a definite term not exceeding a year at a rent of less than £40 per annum, or, in the case of a furnished dwelling-house or apartment, at any rent, but for a definite period less than a year (*p*). In the case of foreign

(*e*) Finance (1909–10) Act, 1910 (10 Edw. 7, c. 8), s. 74 (5)
(*f*) *Ibid.*, s. 74 (6), as amended by Finance Act, 1942 (5 & 6 Geo. 6, c. 21), s. 44.
(*g*) It is to be noted that this problem in relation to dealings by unit holders under unit trusts has been met by special statutory provisions. (Finance Act, 1946 (9 & 10 Geo. 6, c. 64), ss. 56 (4) and 57 (2)). Do these betray any official uneasiness?
(*h*) 54 & 55 Vict. c. 39.
(*l*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 22.
(*m*) *Ibid.*, s. 34 (1), as amended by Revenue Act, 1909 (9 Edw. 7, c. 43), s. 10.
(*n*) *Ibid.*, s. 101 (2).
(*o*) *Ibid.*, s. 99.
(*p*) *Ibid.*, s. 78, as amended by Finance Act, 1924 (14 & 15 Geo. 5, c. 21), s. 35.

bills of exchange (*q*) and contract notes used in connection with Stock Exchange transactions (*r*) an adhesive stamp is obligatory.

When an adhesive stamp is permitted or required it must generally (as will be seen) be stamped before execution. The stamp may, unless a special stamp (known as an appropriated stamp) is required by the charging section, be an ordinary postage stamp if the duty does not exceed 2s. 6d. (*s*). Where an appropriated stamp is required (*t*) only the particular stamp appropriated for the instrument in question may be used. Appropriated stamps are required for bills of exchange and promissory notes payable more than three days after sight (*u*) and contract notes (*a*). Where the duty exceeds 2s. 6d. and may be denoted by an adhesive stamp which in practice occurs (apart from appropriated stamps) only with certain leases, a special adhesive stamp differing from the postage stamps is provided.

Where an impressed stamp is required, then, unless the instrument is executed on sufficiently stamped material, the practice is to execute the instrument and to present it to the Revenue at their department at Bush House or elsewhere for stamping. This practice is so bound up with the question of the time for stamping that it is best discussed under that head.

Time for Stamping

It is the theory of the Stamp Act, 1891 (*b*), that all instruments executed in the United Kingdom will normally be stamped before execution; and the relevant sections of the Act are drafted as if stamping after execution were exceptional. In fact almost all impressed stamping is effected after execution.

The sections referred to under the previous heading authorising or directing the use of adhesive stamps all (with the exception of bills of exchange and promissory notes executed abroad) direct that the person or the first person executing the instrument shall

(*q*) *Ibid.*, s. 34 (2).
(*r*) Finance (1909–10) Act, 1910 (10 Edw. 7, c. 8), s. 78 (4).
(*s*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 7.
(*t*) As to appropriated stamps: see Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 10. Certain impressed stamps are appropriated stamps. It provides that a stamp which by words on its face is appropriated to any particular description is not available for stamping an instrument of any other description and that an instrument falling under the particular description is not to be stamped with any other type of stamp. It would appear that the Revenue may without further statutory authority extend the list of appropriated stamps.
(*u*) *Cf.* Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 37, where the reference to "denomination" is a reference to appropriated stamps. The appropriated stamp is impressed in the case of bills drawn or made in the United Kingdom and adhesive in the case of other bills.
(*a*) Finance (1909–10) Act, 1910 (10 Edw. 7, c. 8), s. 78 (4).
(*b*) 54 & 55 Vict. c. 39.

cancel the stamp. It follows that apart from the exception above mentioned an adhesive stamp may not be affixed after execution even to an instrument executed abroad. In the case of bills of exchange and promissory notes (including cheques) executed abroad section 35 of the Stamp Act, 1891 (*c*), directs that any person into whose hands a bill of exchange or promissory note drawn or made out of the United Kingdom comes before it is stamped in the United Kingdom shall, before he presents it for payment or indorses or transfers it or in any manner negotiates or pays it, affix the necessary adhesive stamp thereto. This is the only case in which an adhesive stamp may be attached after execution, and this provision accounts for the fact that when a person pays a foreign cheque into his bank account the bank always demands 2d. for a stamp to be affixed to it.

The regulations for stamping instruments after execution with an impressed stamp can be deduced somewhat indirectly from section 15 of the Stamp Act, 1891 (*d*), but a casual reading of the section would give a wholly erroneous impression of the practice.

The section begins by providing that an unstamped or insufficiently stamped instrument may be stamped after execution on payment of the duty (with interest at 5 per cent. per annum from the date of execution if the duty is more than £10) and also on payment of a penalty of £10. The penalty (which shall be distinguished from a fine) is not a criminal penalty but the price to be paid for stamping after execution. It can only be enforced by a refusal to stamp in default of payment. Under the section payment of a penalty is to be denoted by a special stamp.

Next the section provides in relation to *ad valorem* duty on certain tabulated classes of instruments (being in fact those upon which the larger amounts of duty are likely to be payable (*e*)) that they are to be stamped within thirty days of execution, unless within that time the opinion of the Commissioners as to the amount of duty has been sought (*f*). Further, if any such instrument is not stamped in conformity with the provisions of the section it can only be stamped on payment of the duty and penalty of £10 (with interest) above referred to and an additional penalty of the amount of the duty. Further, the party to the instrument specified

(*c*) 54 & 55 Vict. c. 39.

(*d*) 54 & 55 Vict. c. 39.

(*e*) The tabulated instruments are: Bond, covenant or other instrument for payment of money at stated periods; Conveyance on sale; Lease; Mortgage, bond, debenture, covenant; and settlement. Voluntary conveyance was added by s. 74 (3) of the Finance (1909–10) Act, 1910 (10 Edw. 7, c. 8).

(*f*) This is a reference to adjudication which will be considered later in this article.

in the table of instruments affected by this provision incurs a fine (to be distinguished from a penalty) of £10 (*g*).

Next the section provides that an instrument executed outside the United Kingdom may be stamped on payment of the unpaid duty only within thirty days after it is first brought within the United Kingdom. Further, power is given to the Commissioners to mitigate or remit any penalty (*h*).

Any person reading this section would be excused if he inferred that the right course was to stamp all documents before execution. In fact he would find this very difficult, as it is only possible to obtain material bearing an impressed stamp (not appropriated to bills of exchange) of 2d. or 6d. or 10s. In practice the Revenue (except in cases where stamping after execution is expressly prohibited or limited or where a fine for failure to stamp is imposed) allow all instruments requiring a stamp of 6d. to be stamped up to fourteen days after execution, and most other instruments to be stamped up to thirty days after execution, without penalty. The normal practice is therefore to present the instrument for stamping soon after execution. It is then marked with the appropriate amount of duty by a member of the Revenue staff and on payment of the amount marked it will be stamped accordingly. The procedure in case of disagreement on the amount of the duty will be considered later under the heading of adjudication. The fact that an instrument is stamped in accordance with such a marking is not conclusive that it is sufficiently stamped, as it would be if it were adjudicated as properly stamped. But if an instrument stamped in accordance with such a marking turns out to be insufficiently stamped the Revenue would no doubt permit it to be stamped up to the correct amount on payment of the additional duty without penalty. As an impressed stamp shows the date of stamping it is possible by comparing that date with the date of execution to see whether the instrument was stamped before execution (by using stamped material) or after execution pursuant to a marking. The latter affords some protection against a subsequent liability for penalties.

In certain cases there is a statutory prohibition on stamping after execution in which case of course the Revenue does not allow

(*g*) The nature of the fines imposed by the Stamp Act is considered later in this article.

(*h*) Under the section as originally enacted there was a time limit for the exercise of this power. The limit was removed by Finance Act, 1895 (58 & 59 Vict. c. 15), s. 15.

it. Thus, bills of exchange and promissory notes drawn or made in the United Kingdom can only exceptionally be stamped after execution (*l*). Contract notes (being stampable only by adhesive stamp cancelled at the time of execution) cannot be stamped thereafter (*m*). Receipts can be stamped only within a month after execution and then only on payment of a special penalty which is exacted (*n*). Other instruments provide for a special penalty on stamping after execution which in practice is exacted (*o*). In general if a fine is imposed for failure to stamp, the Revenue do not allow stamping without penalty after liability to the fine has been incurred. Exceptionally, however, the leases of dwelling-houses that may be stamped with an adhesive stamp (*p*) will be stamped without penalty by impressed stamp up to fourteen days after execution.

Foreign documents

It is nowhere stated in the Stamp Act, 1891 (*q*), that foreign documents do not require to be stamped. No one, however, supposes that British stamp duties are payable in connection with a domestic transaction between two Eskimos in Greenland (*r*). In fact, however, the Act gives some guidance as to the territorial limits applicable. It will be seen that one of the principal sanctions by which the payment of stamp duties is enforced is the fact that unstamped documents are not admissible in evidence in civil proceedings until they have been stamped. This is provided for in section 14 of the Stamp Act, 1891 (*s*), subsection (4) of which provides that (except as in the section provided) an instrument executed in the United Kingdom, or relating, wherever executed, to any property situate or to any matter or thing done or to be done in any part of the United Kingdom, shall not be admissible unless duly stamped. The inadmissibility of unstamped documents is not the only sanction in relation to all documents, but it is thought that apart from the special provisions of the Acts relating to instruments transferable by delivery, this section gives the key, and that documents admissible in evidence without a stamp as not falling in the categories specified in the above subsection do

(*l*) Stamp Act, 1891 (54 & 55 Vict. c. 39), ss. 34 and 37. See also Finance Act, 1933 (23 & 24 Geo. 5, c. 19), s. 43.
(*m*) Finance (1909–10), Act, 1910 (10 Edw. 7, c. 8), s. 78.
(*n*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 102.
(*o*) *e.g.*, policies of sea insurance, *ibid.*, s. 95.
(*p*) *Ibid.*, s. 78.
(*q*) 54 & 55 Vict. c. 39.
(*r*) *Cf. per* Scrutton L.J. in *Re Haig* (1922) 17 A.T.C. 635 at p. 648.
(*s*) 53 & 54 Vict. c. 55.

not require to be stamped for any other purpose of the Acts (*t*). The section is fairly clear but the words "relating . . . to any matter or thing done or to be done in the United Kingdom" are very wide and might give rise to questions of difficulty. In the only decision on the words it was held that a transfer of property in France in consideration of the issue of shares in an English company required a stamp even though the instrument was an "acte d'apport" executed in France (*u*).

Apart from this, the Stamp Acts contain provisions imposing fines on persons who in the United Kingdom issue, assign, transfer, negotiate or offer for subscription various types of foreign negotiable securities such as bills of exchange, promissory notes, share warrants and stock certificates to bearer (*a*). In this connection the Commissioners are specially authorised to permit any foreign or colonial security to be stamped without penalty regardless of the date (*b*).

Enforcement of stamp duties—effect of failure to stamp

There are several types of provision in the Stamp Acts which are calculated to ensure that the necessary duties are paid and that all instruments which ought to be stamped are in fact stamped. It is best to deal with them separately.

(1) **Unstamped documents not admissible in evidence.** This is the major sanction for ensuring that documents are duly stamped, since when combined with the fact that instruments can in general only be stamped out of time on payment of a penalty it is calculated to ensure that documents will not be left unstamped on the chance that they may never be needed in evidence. Section 14 of the Stamp Act, 1891 (*c*), lays down elaborate procedure to be followed when an unstamped document which can still be stamped is tendered in evidence—involving the payment of duty and the full penalty and an additional penalty of £1, the court or arbitrator having no power to remit penalties. In fact this procedure is rarely employed in actions in court, the normal practice being for the solicitor of the party tendering the document to give an undertaking

(*t*) This view is supported by the Companies Act, 1948 (11 & 12 Geo. 6, c. 38), s. 121, which provides that an instrument of transfer of a share registered in a dominion register shall be deemed to be a transfer of property situate outside the United Kingdom and unless executed in the United Kingdom shall be exempt from Stamp Duty.

(*u*) *I. R. C.* v. *Maple & Co. (Paris) Ltd.* [1908] A.C. 22

(*a*) See Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 35 (bills of exchange and promissory notes) and s. 83, and Finance Act, 1899 (62 & 63 Vict. c. 9), s. 4 (3).

(*b*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 84. It will be remembered that under s. 35 bills of exchange and promissory notes executed abroad could be stamped with an adhesive stamp after execution.

(*c*) 54 & 55 Vict. c. 39.

to have the document stamped and any penalty that may be exacted paid (*d*). It will be appreciated also that the various documents such as settlements and deeds of covenant which wealthy persons execute with a view to lightening the load of income tax, surtax or estate duty will not serve their purpose unless properly stamped, and the Revenue can decline to give effect to them under threat of the fact that in the last resort legal proceedings (for which a stamp would be necessary) would be required to force the Revenue to do so.

An unstamped document is stated by the Act not to be available for any purpose whatever in civil proceedings (*e*). Under earlier Acts with different words it was held in many cases including a decision of the House of Lords (*f*) that an unstamped document was admissible to prove collateral matters. It was suggested, however, in *Fengl* v. *Fengl* (*g*) that under the present Act the words are so strong that an unstamped instrument is not admissible even for collateral purposes. In a more recent Scottish case this was still regarded as an open question (*h*). A decision of the Privy Council on similar words of the Indian Stamp Act (*k*) strongly supports this strict view and it is thought that an unstamped document is inadmissible for all purposes whether the subject-matter of the document or collateral to it. Thus an unstamped receipt on a hotel bill given to a week-end visitor is inadmissible both for proving that the bill was paid by him and for proving that he committed adultery with the lady who spent the week-end with him. Unstamped instruments have been admitted, however, to prove fraud (*l*) or an act of bankruptcy (*m*), and in an action to set aside an agreement and to restrain the defendant from carrying it into effect the plaintiff was not compelled to stamp it when, if his claim succeeded, the agreement would be void (*n*).

As with most unstamped documents, the defect can be cured by payment of a penalty, it is unprofessional for counsel to object that a document is not properly stamped. But if the court takes the objection counsel may, if so invited, assist the court by arguing on the point. This does not apply to a document such as an unstamped bill of exchange or promissory note which cannot be stamped at the date when it is tendered in evidence, as the want of a stamp then

(*d*) *Re Coolgardie Goldfields Ltd.* [1900] 1 Ch. 475 at p. 477 and *Parkfield Trust* v. *Dent* [1931] 2 K.B. 579.
(*e*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 14 (4).
(*f*) *Matheson* v. *Ross* (1849) 2 H.L.C. 286. (*g*) [1914] P. 274.
(*h*) *Watson* v. *Watson* [1934] S.C. 374 at p. 379.
(*k*) *Ram Rattan* v. *Parma Nand* (1945) L.R. 73, Ind.App. 28.
(*l*) See *Re Shaw* (1920) 90 L.J.K.B. 204.
(*m*) *Re Gunsbourg* (1919) 88 L.J.K.B. 562.
(*n*) *Mason* v. *Motor Traction Co.* [1905] 1 Ch. 419.

goes to the validity of the document. Here counsel will take the objection (*o*). An appeal may be made against a decision that a document is not duly stamped, but not against a decision that it is (*p*).

(2) **Fines.** The Stamp Acts impose fines for numerous miscellaneous acts and omissions relating to stamp duties. These fines must be distinguished from penalties which are payable as the price of stamping out of time, but the verbal distinction is not always carefully observed by either the judiciary (*a*) or even by the Act itself (*b*). These fines are not enforced by criminal proceedings but are recoverable as debts to Her Majesty by ordinary action (*c*). Thus a master is vicariously liable for such a fine in respect of the act of a servant (*d*). The fines are imposed with a view to securing the payment of these duties and the matters affected by them assist in achieving this object in four main ways :

(a) Fines are imposed with a view to the prevention of frauds and neglect of statutory duty. Thus fines are imposed for frauds relating to the misuse of impressed (*e*) and adhesive (*f*) stamps, for neglect to cancel adhesive stamps (*g*) and for executing or preparing a document which does not set out all the facts and circumstances with intent to defraud Her Majesty (*h*). This last is an important provision, though in fact, as will be seen in connection with adjudication, it is often impracticable to set out in the instrument all the facts and circumstances relevant to the assessment of stamp duty, *e.g.*, the value of property conveyed by voluntary conveyance. No penalty is incurred if the information is given separately as there can then be no intent to defraud.

(b) Fines are imposed on persons who execute or issue or negotiate or otherwise deal in certain documents which are not stamped. These include certain instruments carrying *ad valorem* duty (*i*), bills of exchange and promissory notes (*k*), contract

(*o*) See *e.g.*, *Wirth* v. *Weigel Leygonie & Co., Ltd.* [1939] 3 All E.R. 712. Even in such cases the court sometimes marks its disapproval of stamp objections by depriving the party taking it of his costs. See *Genforsikringsaktieselskabet* v. *Da Costa* [1911] 1 K.B. 137.

(*p*) See Ord. 39 r. 8 of the Rules of the Supreme Court, and for an example of an appeal being allowed from a decision adverse to the document, *The Belfort* (1884) 9 P.D. 215.

(*a*) *Att.-Gen.* v. *Cohen* [1937] 1 K.B. 478 at p. 480, *per* Slesser L.J.

(*b*) *Stamp Act*, 1891 (54 & 55 Vict. c. 39) s. 113 (3).

(*c*) *Ibid.*, s. 121, Crown Proceedings Act, 1947 (10 & 11 Geo. 6, c. 47), s. 13 and First Schedule; Stamp Duties Management Act, 1891 (54 & 55 Vict. c. 38), s. 26.

(*d*) *Att.-Gen.* v. *Carlton Bank Ltd.* [1899] 2 Q.B. 158.

(*e*) Stamp Duties Management Act, 1891 (54 & 55 Vict. c. 38), ss. 4 and 6.

(*f*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 9.

(*g*) *Ibid.*, s. 8.

(*h*) *Ibid.*, s. 5.

(*i*) *Ibid.*, s. 15 (2). Finance (1909–10) Act, 1910 (10 Edw. 7, c. 8), s. 74 (3).

(*k*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 38 (1).

notes (*l*), certain leases for definite periods not exceeding a year (*m*), most bearer documents (*n*), receipts (*o*) and policies of sea insurance (*p*).

(c) Fines are imposed for the neglect or refusal to execute documents which, when executed, would carry a stamp (whether or not any fine is separately imposed for executing or issuing such documents unstamped). Such fines are imposed in relation to contract notes (*q*), policies of insurance, other than sea insurance (*r*), and receipts (*s*). Further, in relation to certain statements relating to capital duty (*t*), and loan capital duty (*u*), penal sums not described as fines but as debts due to Her Majesty become payable.

(d) Lastly fines are imposed on certain persons who give effect to unstamped instruments. These fines are very important as they are imposed on third parties who have no interest in the matter other than to cover themselves against liability. By refusing to give effect to an unstamped instrument they force the person concerned to have effect given to it, to have the instrument stamped. By far the most important of these is the fine imposed by section 17 of the Stamp Act, 1891 (*a*), upon any person whose office it is to enrol, register or enter in or upon any rolls, books or records, any instrument chargeable with duty and who enters such instrument not duly stamped. This section applies to persons who keep the registers of members and debenture holders of companies and ensure that transfers of shares and debentures are properly stamped. A company may refuse to register a transfer that is not properly stamped and for this purpose may go behind the consideration stated on the face of the instrument (*b*). The section affects the registrar of companies in relation to documents delivered

(*l*) Finance (1909–10) Act, 1910 (10 Edw. 7, c. 8), s. 78 (2).
(*m*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 78 (2), as amended by Finance Act, 1924 (14 & 15 Geo. 5, c. 21), s. 25.
(*n*) *Ibid.*, ss. 31, 83, 107 and 109; Finance Act, 1899 (62 & 63 Vict. c. 9), s. 5.
(*o*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 103. This section imposes fines for certain other offences relating to receipts.
(*p*) *Ibid.*, s. 97. Fines are imposed for other offences relating to sea insurance.
(*q*) Finance (1909–10) Act, 1910 (10 Edw. 7, c. 8), s. 78 (3).
(*r*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 100.
(*s*) *Ibid.*, s. 103.
(*t*) *Ibid.*, s. 113 (3).
(*u*) Finance Act, 1899 (62 & 63 Vict. c. 9), s. 8 (4).
(*a*) 54 & 55 Vict. c. 39.
(*b*) *Maynard* v. *Consolidated Kent Collieries* [1903] 2 K.B. 131; *Conybear* v. *British Briquettes Ltd.* [1937] 4 All E.R. 191. In *Re Indo-China Steam Navigation Co.* [1917] 2 Ch. 100 at p. 106, Eve J. stated *obiter* that the registration of an insufficiently stamped transfer could not while the transfer remained insufficiently stamped bring about a legal transfer. It is submitted that this is not correct and that, if it were, it would have found some place in the judgments in the two cases first mentioned in this note.

to him for filing (*c*). It affects instruments registered in the Yorkshire Deeds Registry and instruments to be registered by the Land Registrar (*d*). In the case of *R.* v. *Registrar of Joint Stock Companies* (*e*), it was held that, where the registrar of companies refused to register an instrument on the ground that it was improperly stamped, the correct method of contesting the issue whether it was or was not properly stamped, was to have the stamp adjudicated, and, if necessary, appeal and not to apply for an order of mandamus to compel registration. It is thought that it would be wise to follow this practice in a case where a company refuses to register a transfer on the ground that it is not properly stamped, in preference to taking proceedings for rectification of the register as was done unsuccessfully in the first two cases cited in note (*b*).

Other sections of the Stamp Act, 1891 (*f*), which operate by penalising third parties who act on unstamped instruments, are the sections imposing fines on brokers who negotiate or transact sea insurance where the policy is not duly stamped (*g*), and the section which prohibits the payment of the money on policies of life insurance to an assignee of the policy unless the assignment is duly stamped (*h*).

(3) **Proof of title.** Just because an unstamped instrument cannot be used in evidence a purchaser will be unwilling to accept a title to property (where he investigates the title) which includes an unstamped document. It was held in the case of *Whiting to Loomes* (*l*) that a purchaser was entitled to reject such a title. This only applies if the instrument is indispensable in proving title (*m*). The importance of this is greatly increased by section 117 of the Stamp Act, 1891 (*n*), which in relation to any instrument executed after May 16, 1888, renders void any condition of sale framed with the view of precluding objection or requisition upon the ground of absence or insufficiency of stamp. It is thought that this provision would not, however, prevent a vendor from

(*c*) *e.g.*, contracts and particulars of contracts relating to the issue of shares for a consideration other than cash, Companies Act, 1948 (11 & 12 Geo. 6, c. 38), s. 52, and mortgages and charges, *ibid.*, s. 95.

(*d*) See Land Registration Rules, 1925 (S.R. & O. 1925 No. 1093), Rule 95,

(*e*) (1888) 21 Q.B.D. 131.

(*f*) 54 & 55 Vict. c. 39.

(*g*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 97 (2). The section makes their brokerage or commission irrecoverable.

(*h*) *Ibid.*, s. 118. This section, of course, entitles the insurance company to refuse to pay unless the instrument is stamped: *Re Waterhouse's Policy* [1937] Ch. 415.

(*l*) (1881) 17 Ch.D. 10.

(*m*) *Ex p. Birkbeck Freehold Land Soc.* (1883) 24 Ch.D. 119.

(*n*) 54 & 55 Vict. c. 39.

rescinding a contract under the common condition of sale authorising rescission if a purchaser refuses to withdraw a troublesome requisition. In this connection it is instructive to compare the wording of the section of the Law of Property Act, 1925 (*o*), rendering certain conditions of sale void. At all events it would seem that if a vendor is not entitled to rescind under the condition above referred to then the condition must, under section 117, be void for all purposes.

Again it is submitted that a trustee is entitled to refuse to act on an unstamped assignment of a beneficial interest under the trust and that a debtor may likewise refuse to recognise an unstamped assignment of the debt (*p*).

(4) **Recovery by action.** Only in a very few cases are stamp duties recoverable as a debt due to Her Majesty by action. Capital duty on companies incorporated under the Companies Acts in case of any increase of capital is recoverable under section 5 of the Revenue Act, 1903 (*q*). Loan capital duty imposed by section 8 of the Finance Act, 1899 (*r*), is recoverable by action but only if the statement required by that section has been delivered to the Commissioners. The stamp duty on an assignment of a policy of life insurance, together with a penalty, is recoverable from any person who pays the policy moneys to the assignee if the assignment is not already stamped (*s*). Where it is shown that the remission of stamp duty in connection with the amalgamation or reconstruction of companies has been improperly obtained or the conditions for remission are broken the duty is sometimes recoverable as a debt (*t*). Finally corporation duty (which is declared to be a stamp duty) is recoverable only by action, or as being a charge on the property on which it is levied. When an instrument mentioned in the table in section 15 (2) (d) of the Stamp Act, 1891 (*u*), is once submitted for adjudication, the adjudicated duty (subject to appeal) is recoverable by action (*v*).

(*o*) 15 Geo. 5, c. 20, s. 42 (8).

(*p*) This is apart from the right conferred by the penal provision of s. 118, in relation to life assurance policies: *Re Waterhouse's Policy* [1937] Ch. 415. An interest under a trust and a legal chose in action must be assigned in writing: Law of Property Act, 1925 (15 Geo. 5, c. 20), ss. 53 (1) (c) and 136.

(*q*) 3 Edw. 7, c. 46. Contrast the penal provisions for enforcing capital duty payments on capital of other companies: Stamp Act, 1891 (54 & 55 Vict. c. 34), s. 113 (3). Capital duty on the incorporation of companies under the Companies Acts is levied by the refusal of a certificate of incorporation until payment is made.

(*r*) 62 & 63 Vict. c. 9.

(*s*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 118 (2).

(*t*) 54 & 55 Vict. c. 39. The table is enlarged by Finance (1909–10) Act, 1910 (10 Edw. 7, c. 8), s. 74 (3).

(*u*) Finance Act, 1927 (17 & 18 Geo. 5, c. 10), s. 55 (6).

(*v*) Stamp Act, 1891, s. 15 (2) (b).

Some problems in the assessment of duty

(1) **Contingent unascertained consideration, etc.** It often happens that the consideration or other amount upon which *ad valorem* duty is calculated is not of a fixed or definite amount, *e.g.*, a price to be fixed by an expert or a royalty to be governed by the amount of the profits. In such a case, unless the amount can be calculated at the time of execution so that there is some fixed peg (such as a maximum or minimum) upon which to hang the *ad valorem* duty, no such duty can be claimed and the instrument will only bear such fixed duty (if any) as it will attract, *e.g.*, 6d. as an agreement or 10s. as a deed. "I can understand," said Scrutton J. in *Underground Electric Railways and Glyn Mills & Co.* v. *I. R. C.* (*w*), "that if you cannot ascertain from the instrument a fixed sum which may become payable, though on contingencies, you cannot stamp *ad valorem*." If there is a minimum fixed sum payable, such as a minimum royalty, the Revenue are entitled to claim *ad valorem* duty on the minimum and fixed duty on the possibility of some larger sum (*x*). A common example of a minimum sum is the form of seven-year covenant to pay such a sum as after the deduction of income tax will yield a clear net sum of, say, £100 per annum. *Ad valorem* duty can only be levied on the £100 as there is no limit to the rate of income tax which might be levied before the seven years expire. It is thought that the Revenue do not in this case claim a further 10s. for the additional liability to pay the amount of £100 net instead of gross.

Where there is on the other hand a maximum sum payable, as with a maximum royalty, or a sum payable on a contingency, duty is leviable on this maximum, however unlikely it is to be reached. This is known as the "contingency principle" which is well established as a general principle by decided cases (*a*) and is, in special cases, actually provided for by the Stamp Act, 1891 (*b*).

This principle does not apply where the *ad valorem* duty is to be calculated on the value of property which may vary with circumstances. Here the property must be valued by taking all the chances and contingencies into consideration and estimating what a purchaser would pay for it. Thus in *Stanyforth* v. *I. R. C.* (*c*), an interest in a very large amount of property, being

(*w*) [1914] 3 K.B. 210 at p. 220; on appeal [1916] 1 K.B. 306.

(*x*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 4 (b); *Jones* v. *I. R. C.* [1895] 1 Q.B. 434, and see "double operation of an instrument," *infra*.

(*a*) *Underground Electric Ry. and Glyn Mills & Co.* v. *I. R. C.* [1916] 1 K.B. 306, C.A.; *International Power Co.* v. *I. R. C.* (1933) 12 A.T.C. 413.

(*b*) 54 & 55 Vict. c. 39. See s. 37 (conveyance in consideration of a debt contingently due), s. 88 (1) (mortgage to secure a sum which is in any way limited).

(*c*) [1930] A.C. 339.

an interest which was capable of immediate revocation, was valued at an insignificant figure.

(2) Double operation of an instrument. Obviously stamp duties cannot be avoided by the incorporation in one instrument of two transactions each requiring a separate stamp. In such cases it would appear clear that two stamps would be required. Lest there should be any doubt about the matter sections 3 (2) and 4 of the Stamp Act, 1891 (*d*), make special provision. Section 3 (2) provides that if more than one instrument is written on the same piece of material, each is to be separately and distinctly stamped. It was held under this section that an insurance policy, on which the amount assured was altered to rectify a mistake by an endorsed memorandum, required a separate stamp for the memorandum as a policy for the difference between the two sums assured (*e*). Section 4 makes two distinct provisions (both expressly subject to the provisions of the Act), first, that an instrument relating to several distinct matters is to be separately and distinctly stamped in respect of each, and secondly that an instrument made for any consideration in respect of which it is chargeable with *ad valorem* duty and for further or other valuable consideration is separately chargeable in respect of each consideration. On the other hand, it was said in the course of the judgment of the Court of Exchequer Chamber in *Limmer Asphalt Paving Co.* v. *I. R. C.* (*f*), a decision on an earlier Act which is still regarded as applicable, that "there is no better established rule as regards stamp duty than that all that is required is that the instrument should be stamped for its leading and principal object and that this stamp covers everything accessory to this object."

It is obvious that there is a borderland between the principle contained in the foregoing quotation and that laid down in the sections above referred to, and that in that borderland it may be very difficult to answer the question, whether the instrument is to be stamped for one purpose only or for two or more. It seems that two *ad valorem* duties, if payable, will always be exigible. In other cases the question is commonly academic since if an *ad valorem* duty of some hundreds of pounds is being levied, no one is prepared to expend much time or trouble in arguing whether or not an additional 10s. is payable to cover a covenant outside the main transaction involved. Accordingly, if the extra 10s. is demanded, it is probably paid. Nevertheless, occasions do arise when parties attach sufficient importance to the matter to contest

(*d*) 53 & 54 Vict. c. 39.
(*e*) *Prudential Assurance Co. Ltd.* v. *I. R. C.* [1935] 1 K.B. 101.
(*f*) (1872) L.R. 7 Ex. 211 at p. 217.

it, and some attempt must be made to understand the working of these principles. It has been suggested that the only test that can be extracted from the decided cases is that where there is a community of interest between the parties to the transactions effected or they are effected with a common purpose then (except when two stamps are payable in respect of different considerations under section 4 (b)) only a single stamp is called for. If these conditions are not satisfied then two duties must be paid. Thus where executors used one instrument of transfer to convey shares, part of residue, to four residuary legatees, it was held that four stamps could be levied (*g*). On the other hand a conveyance by several shareholders jointly bears only one stamp (*h*). For example, it sometimes happens that a capital reorganisation scheme is proposed in a company in which, say, the ordinary shareholders are required to transfer part of their holdings to the preference shareholders in consideration of some adjustment of their rights. This transfer is normally effected by a composite document transferring all the shares affected from all the ordinary shareholder transferors to all the preference shareholder transferees. Such composite transfer would, it is suggested, bear only one stamp. Another well known case of two stamps is an appointment of new trustees, which expressly revests the trust property. The instrument bears a stamp of £1, 10s. for the appointment and 10s. for the vesting (*l*). If the provisions of section 40 (1) (b) or section 40 (2) (b) of the Trustee Act, 1925 (*m*), are relied on and no express vesting provision is included, only a 10s. stamp is in practice exacted. An important example of the cases where only one stamp is payable is the conveyance of land on sale. No further duty is payable because the conveyance contains covenants on the part of the vendor, or covenants by the purchaser not amounting to further consideration, *e.g.*, restrictive covenants as to user, which cannot be part of the consideration for the transfer (*n*).

Two exceptions have been noted in passing. First, two *ad valorem* duties are always payable. Thus, in *Ansell* v. *I. R. C.* (*o*), there was a settlement of an insurance policy and Government securities (which could normally be transferred, voluntarily or otherwise, free of duty). Voluntary conveyance duty was payable on the policy and settlement duty on the securities. The second

(*g*) *Freeman* v. *I. R. C.* (1871) L.R. 6 Ex. 101.
(*h*) *Wills* v. *Bridge* (1849) 4 Ex. 193.
(*l*) *Hadgett* v. *I. R. C.* (1877) 3 Ex. D. 46.
(*m*) 15 Geo. 5, c. 19.
(*n*) See *Wolseley* v. *Cox* (1841) 2 Q.B. 321, a case of covenant by the purchaser of shares in a transfer of shares.
(*o*) [1929] 1 K.B. 608.

exception was the case where there are two separate considerations. Here too, a common interest or purpose is not sufficient to save two stamps. Thus, a covenant to make a payment of uncertain amount but with a minimum attracts *ad valorem* duty on the minimum and fixed duty on the possibility of more (*p*).

There are a number of statutory exceptions under which one stamp only is payable. It may be questioned whether all the provisions are necessary but they serve to quiet doubts. Thus, no additional duty is payable where on a conveyance on sale with the purchase-money payable by instalments provision is made for securing the instalments (*q*); nor where a lease contains provisions for a penal rent (*r*) or a lease or conveyance on sale contains covenants for improving the property or relating to the subject-matter of the lease or conveyance (*s*); nor where a settlement contains provisions for the transfer of money or stock settled or for certain other payments (*t*); nor where a transfer of a mortgage contains further charges or gives additional security (*u*); nor where a mortgage limits the equity of redemption to some person other than the mortgagor (*a*); nor where a power of attorney appoints more than one attorney (*b*). Further, section 74 (4) of the Finance (1909–10) Act, 1910 (*c*), provides that an instrument chargeable to duty both as a settlement and as a voluntary conveyance shall bear only the latter duty (*d*). Lastly, it is provided in the exemptions under the heading "Receipt" in the First Schedule to the Stamp Act, 1891, that a receipt indorsed or written on an instrument liable to stamp duty and duly stamped and acknowledging the receipt of the consideration money therein expressed or the receipt of any principal money or interest or annuity thereby secured or therein mentioned is exempt from duty (*e*). Hence, for instance, no stamp is required in respect of the receipt clause in the common form of conveyance on sale.

(*p*) *Jones* v. *I. R. C.* [1895] 1 Q.B. 484.
(*q*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 56 (4).
(*r*) *Ibid.*, s. 77 (1).
(*s*) *Ibid.*, s. 77 (2), (as to leases, by the Revenue Act, 1909 (9 Edw. 7, c. 43), s. 8, this exemption does not apply where the further covenant would, if it had been in a separate deed, have attracted *ad valorem* duty); Finance Act, 1900 (63 & 64 Vict. c. 7), s. 10 (as to conveyances).
(*t*) Stamp Act 1891 (54 & 55 Vict. c. 39), s. 105.
(*u*) *Ibid.*, s. 87 (3).
(*a*) *Ibid.*, s. 87 (6).
(*b*) Finance Act, 1927 (17 & 18 Geo. 5, c. 10), s. 56.
(*c*) 10 Edw. 7, c. 8.
(*d*) This is only, of course, in respect of the same property. The case of *Ansell* v. *I. R. C.* [1929] 1 K.B. 608 shows that some property comprised in a settlement may bear settlement duty while the rest bears voluntary conveyance duty.
(*e*) 54 & 55 Vict. c. 39. See Exemption (11) under heading Receipt.

(3) **Instruments answering more than one description.** It happens not infrequently that an instrument looked at in different ways falls under more than one head of stamp duty. This is not a case of the instrument effecting two things and there is no question of double stamp duty. But the question arises how it is to be stamped. Thus a promissory note may also be a marketable security (*f*), and a transfer of a mortgage may also be a voluntary conveyance *inter vivos* (*g*). It was held in the cases cited in the foregoing notes (*f*) and (*g*) that the Revenue is entitled to whichever duty is the larger. It is to be presumed that the stamp for the larger duty may be affixed after execution even though the smaller duty was one incapable of being affixed after execution. It has yet to be decided whether in a case where the failure to stamp with the smaller duty does, but the failure to stamp with the larger duty does not, attract a fine, the fine can be exacted for not stamping the instrument at all, *i.e.*, whether the Revenue (if it suits them) claim the smaller duty instead of the larger.

There is one statutory exception to the rule. Section 74 (4) of the Finance (1909–10) Act, 1910 (*h*), provides that an instrument which is chargeable with duty both as a settlement and as a voluntary conveyance shall bear the latter only. As the latter duty is at a rate eight times as great as the former it will not often occur that any exception is made to the rule, but it is possible for settlement duty to exceed voluntary conveyance duty (*l*). By an extra-statutory concession where the *ad valorem* duty on a transfer of a mortgage does not exceed 10s. this amount, and not 10s., is exacted (*m*).

(4) **Single transaction effected by more than one instrument.** Many transactions are effected by two or more instruments. Thus a contract may consist of an offer and an acceptance or a settlement of a vesting deed and a trust instrument. The general rule in these cases (which is sometimes stated expressly in the Act) is that *ad valorem* duty is not paid more than once and that fixed duty is only paid more than once where each instrument taken by itself attracts a stamp, *e.g.*, because it is a deed. Thus, in a case of a contract comprising an offer and acceptance under hand, one 6d. stamp is sufficient, which logically should be affixed to the

(*f*) *Speyer Bros.* v. *I. R. C.* [1908] A.C. 82.

(*g*) *Anderson* v. *I. R. C.* [1939] 1 K.B. 341. In argument for the Revenue in this case counsel stated (at p. 343) that they do not claim a transfer of a mortgage for value to be a conveyance on sale.

(*h*) 10 Edw. 7, c. 8.

(*l*) As with a policy of life insurance where provision has been made for keeping it up: Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 104.

(*m*) See Appendix to 93rd Annual Report of the Commissioners of Inland Revenue (Cmd. 8103).

acceptance (*n*). As the Revenue have never insisted on double *ad valorem* duty in cases where two instruments are used to effect one transaction, there is very little authority on the point, as no one cares to contest the matter. It is expressly provided by statute that where there are several instruments of conveyance, the principal instrument only is to be liable to *ad valorem* duty, and the others to such duty as they may be liable not exceeding the *ad valorem* duty (*o*), and that where several instruments are executed for effecting the same settlement and the *ad valorem* duty exceeds 10s., then only one instrument bears *ad valorem* duty and the others bear a duty of 10s. (*p*). Another case where two sets of duty are not claimed is where an issue of debentures is secured by a trust deed. The Revenue will stamp the trust deed 10s. on production of the debentures duly stamped *ad valorem* or on deposit with the Commissioners of the duty on those not yet issued. This, however, may now be attributed to a different statutory provision altogether (*q*). Loan capital duty is not charged to the extent that it is shown to the Commissioners that stamp duty payable in respect of a mortgage or marketable security has been paid on some other relevant document (*r*).

Where an instrument is executed with one or more duplicates or counterparts, such duplicates or counterparts pay the same duty as the original with a maximum (where the original is duly stamped) of 5s. (*s*).

(5) **Consideration in kind.** *Ad valorem* duty is not usually levied on consideration in kind (*t*). But it is levied in certain cases on a consideration consisting of stock or marketable securities (*u*), and it is levied on a consideration in foreign money. Section 6 of the Stamp Act, 1891 (*v*), provides the method of calculating the duty, *viz.*, by reference to the value at the date of the instrument.

(*n*) A written offer accepted orally or by conduct requires no stamp: *Carlill* v. *Carbolic Smokeball Company* [1892] 2 Q.B. 484; on appeal [1893] 1 Q.B. 256 (C.A.).

(*o*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 58 (3).

(*p*) *Ibid.*, s. 106; *cf.* Settled Land Act, 1925 (15 Geo. 5, c. 18), s. 4 (3) (e), which provides that the trust instrument shall bear the *ad valorem* stamp duty. It would appear to follow from this that the provisions of s. 106 apply to *ad valorem* voluntary conveyance duty as well as *ad valorem* settlement duty, which latter does not apply to land.

(*q*) Revenue Act, 1903 (3 Edw. 7, c. 46), s. 7, limiting duty on collateral securities to 10s.

(*r*) Finance Act, 1899 (62 & 63 Vict. c. 9), s. 8.

(*s*) Stamp Act, 1891 (54 & 55 Vict. c. 39), Schedule heading "Duplicate or counterpart," and s. 72. A denoting stamp is necessary. Denoting stamps are dealt with later in this article.

(*t*) As to rent under a lease consisting of produce, etc. See Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 76.

(*u*) *e.g.*, Conveyance on Sale, Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 55.

(*v*) 54 & 55 Vict. c. 39.

It should be noted that where the consideration for a conveyance is either the transfer or even the issue of shares it is the actual not the nominal value of the shares transferred or issued that is taken into account. In the common case of such a conveyance on the formation of a company the value of the consideration may thus be the same as the value of the property conveyed (*w*).

Lost, spoiled and wasted stamps and stamped instruments

It may well happen that an instrument is drawn up on stamped paper and never required, or that such mistakes are made in drawing it up as to make it appear wiser or tidier to start again. Again, an instrument may turn out to be absolutely void, though it bears a costly stamp. In all these cases the stamp duty appears to be wasted, but, subject to certain conditions, provision is made for the recovery of the amount wasted (*a*). In order to fall within the section the application must be made within two years of the affixing of the stamp and it can only be made in a limited class of cases—as where the instrument is void *ab initio* or fails for want of execution by a necessary party or is inadvertently spoiled. It is not available, for instance, where the instrument fails through non-fulfilment of a condition precedent or because the instrument, being voidable, is avoided or rescinded by some party entitled to do so. It is also essential that no legal proceedings shall have been commenced in which it would or could have been given in evidence. This last limitation is a serious blot on the relief afforded. Thus, if a legal decision is necessary to determine that an instrument is void *ab initio*, the stamp cannot be recovered.

Section 59 of the Stamp Act, 1891 (*b*), contains a most liberal provision in relation to the stamp duty charged by that section on certain contracts for sale, which are to be stamped as conveyances on sale. Under subsection (6), if the contract is annulled or rescinded or not substantially performed the duty is to be returned by the Commissioners. There is no time limit and no proviso that the instrument shall not have been admissible or admitted in evidence.

Where a duly stamped instrument is lost, there is an extra-statutory concession in force, under which the Commissioners, if satisfied that the original instrument was duly stamped, will stamp a duplicate free of charge or refund the duty on the original when the duplicate is presented for stamping (*c*). It will be appreciated

(*w*) *Carlyon Estates* v. *I. R. C.* (1937) 16 A.T.C. 339.
(*a*) Stamp Duties Management Act, 1891 (54 & 55 Vict. c. 38), s. 9 (7).
(*b*) 54 & 55 Vict. c. 39.
(*c*) See Appendix to the 93rd Annual Report of the Commissioners of Inland Revenue (Cmd. 8103).

that there is a presumption that a lost document was properly stamped (*d*).

Denoting stamps.

In certain cases the proper stamp on one instrument (instrument A) is dependent on the question whether some other instrument (instrument B) is properly stamped—this occurs more particularly where instrument A is liable to a lower rate of duty than would be the case if instrument B were not duly stamped. It is provided by section 11 of the Stamp Act, 1891 (*e*), that, on production of both instruments the Commissioner shall denote on instrument A the amount of duty paid on instrument B.

In practice this is done by the Commissioners by impressing blue stamps indicating the duty paid on instrument B. As most impressed stamps are red, the denoting stamps show up in sharp contrast.

Denoting stamps are more commonly used (a) on duplicates or counterparts showing the amount stamped on the original (*f*), (b) on conveyances on sale or leases which are in the terms of an agreement for sale or for a lease which has already borne *ad valorem* duty (*g*), (c) on collateral or substituted securities (*h*). There are other less important cases.

A denoting stamp is not a guarantee that the stamp denoted in instrument B is sufficient, though in fact, it is some indication that the Commissioners are satisfied that it is. A guarantee can be obtained only by adjudication. In the case of a duplicate or counterpart (other than certain counterpart leases) a denoting stamp is necessary before the instrument can be treated as properly stamped with the duty of 5s., where, if it were not a duplicate, the duty would exceed 5s. (*l*). Provided that the instrument is stamped in time with the proper duty the denoting stamp may be impressed subsequently without penalty.

Adjudication

Any person may require the Commissioners to express their opinion on the stamp duty chargeable on any executed instrument (*m*). If they give their opinion and the instrument is stamped in accordance with it the instrument may further be stamped with a stamp, denoting that it is duly stamped, or requires no stamp.

(*d*) *Marine Investment Co.* v. *Haviside* (1872) L.R. 5 H.L. 624.
(*e*) 54 & 55 Vict. c. 39.
(*f*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 72.
(*g*) *Ibid.*, s. 59 (5), s. 75 (2).
(*h*) Revenue Act, 1903 (3 Edw. 7, c. 46), s. 7, and provisions of the Stamp Act, 1891 (54 & 55 Vict. c. 39), there referred to.
(*l*) Stamp Act, 1891 (54 & 55 Vict, c. 39), s. 72.
(*m*) *Ibid.*, s. 12.

Such a stamp is in effect conclusive that the instrument is properly stamped (*n*). Subject to this right of appeal to the court, an instrument upon which the opinion of the Commissioners is obtained in this manner cannot be stamped with any other duty, There is, however only in the case of the instrument specified in the Table contained in paragraph (d) of section 15 of the Stamp Act, 1891 (*o*), an obligation to stamp where the Commissioners' opinion has been obtained.

There is an obligation to set out all material facts relevant to stamping in the instrument or at least not to omit them with intent to defraud (*p*). In fact it is impossible in many cases to set out all the material facts, and the Commissioners are empowered to obtain information as to all material facts (*q*), and may refuse to adjudicate if the information is not given (*r*). Provided that the instrument is stamped in time with the proper duty the adjudication stamp may be impressed subsequently without penalty.

There may be many reasons why persons should have a stamp adjudicated. The following are perhaps the commonest. (1) Adjudication followed by appeal is the principal method of disputing with the Commissioners the liability of an instrument to duty. (2) Adjudication is bound to satisfy third parties. Where it is thought that a third party might question the sufficiency of a stamp, an adjudication stamp will silence him. (3) Certain documents are not to be treated as properly stamped unless they are so adjudicated (*s*).

Appeals

Any person dissatisfied with an adjudication may appeal to the High Court (*t*). He is, however, required to pay the duty before doing so. Once an appeal is launched there is no escaping the payment of the duty. The appeal is by way of case stated, the Commissioners stating a case which is generally agreed between them and the appellants. The case comes on for hearing in the

(*n*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 12 (5).

(*o*) 54 & 55 Vict. c. 39. See s. 12 (2) (b), the list is supplemented by s. 74 (3) of the Finance (1909–10), Act, 1910 (10 Edw. 7, c. 8).

(*p*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 5.

(*q*) *Ibid.*, s. 12 (2).

(*r*) *R.* v. *I. R. C., ex p. Evill* [1951] 2 T.L.R. 857.

(*s*) *e.g.*, voluntary conveyances, Finance (1909–10) Act, 1910 (10 Edw. 7, c. 8), s. 74 (2); conveyances and transfers relieved from duty in connection with schemes of amalgamation and reconstruction, Finance Act, 1927 (17 & 18 Geo. 5, c. 10), s. 55 (1) Proviso (a); conveyances and transfers relieved from duty as between associated companies, Finance Act, 1930 (20 & 21 Geo. 5, c. 28), s. 42 (1) proviso; conveyances or transfers to charities pay a reduced rate of duty, Finance Act, 1947 (10 & 11 Geo. 6, c. 35), s. 54 (1), proviso.

(*t*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 13.

Chancery Division of the High Court along with other cases in the revenue paper, and, subject to the rules of court, there is a further appeal by either party to the Court of Appeal and (with leave) to the House of Lords. If the appellant succeeds the stamp duty paid by him will be returned to him (*u*).

(*u*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 13 (4).

(*To be continued*)

SOME RECENT CASES ON EASEMENTS

By J. F. Garner, ll.m., Solicitor

"Such a technical branch of the law as the law relating to easements," (*a*) and a branch of the law which owes its fundamental principles to Roman law (*b*) would, one might have been pardoned in expecting, have had all its details settled long before now, and should not be the subject of modern decisions of importance. Easements, however, still exercise the minds of Her Majesty's judges, and in the last few months the law reports have contained several decisions of interest, either settling points of difficulty, or illustrating important principles almost forgotten.

Right to place Articles on Servient Tenement

The heresy that the list of easements recognised by English law is closed, and which some writers have read into the famous case of *Hill* v. *Tupper* (*c*), has once again been refuted in *Copeland* v. *Greenhalf* (*d*). In this interesting case, the defendant endeavoured to establish as an easement (by prescription) (*e*) a right to place vehicles, wheels and other articles in connection with his business as a wheelwright on a piece of land near his workshop, which piece of land was owned by the plaintiff. Upjohn J., whilst agreeing in effect that the novelty of the right claimed was no argument for refusing it the badge of a legal easement, rejected the defendant's argument, because the right claimed "goes wholly outside any normal idea of an easement, that is, a right of the occupier of a dominant tenement over a servient tenement. This claim really amounts to a claim to a joint user of the land by the defendant"; and it is a well-accepted principle that an easement, however novel may be the nature of the right granted, cannot give the exclusive or joint use of the servient tenement to the owner of the

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(*a*) *Per* McNair J. in *London Cemetery Co.* v. *Cundey* [1953] 1 W.L.R. 786, at p. 790.

(*b*) See, *e.g.*, the many Roman maxims and quotations given in the latest edition of Gale on Easements.

(*c*) (1863) 2 H. & C. 121.

(*d*) [1952] 1 All E.R. 809.

(*e*) The problem of the nature of an easement, or whether a particular right amounts to an easement or is a mere licence, most frequently arises when the plaintiff's claim is based on long user, but some cases turns on the construction of deeds.

dominant tenement for all purposes (*f*); and ownership cannot be acquired by prescription unless the previous owner is totally excluded from enjoyment.

The right to dump articles on the land of another for the benefit of the dominant tenement was recognised as an easement in *Smith* v. *Gates* (*g*), where a right to dump chicken coops on a particular parcel of land was held by the Court of Appeal to have been acquired as an easement. It was said in *Copeland* v. *Greenhalf* (*h*) that such a right, to be recognisable as an easement, must be a benefit to the dominant tenement, and not merely to some particular business carried on on that tenement. Nevertheless, this does not mean that the right recognised in *Smith* v. *Gates* could be extended so as to include any kinds of boxes used in any type of business—this would, presumably, amount to an exclusive use of the land condemned in *Copeland* v. *Greenhalf*. Thus, on the facts of *Smith* v. *Gates*, although the right to dump chicken coops used in connection with the defendant's former business as a greengrocer was admitted, it was held by the court that that right could not justify the dumping of kipper and other boxes in large numbers, used in connection with the defendant's new business as a vegetable and fish carrier. Where is the line between these two cases to be drawn? It is, it is submitted, very largely a question of fact and degree; in *Copeland's Case*, the number and size of the articles dumped on the servient tenement were such as to involve an exclusive use of that land; in *Smith* v. *Gates*, the number of coops for which an easement was held to have been acquired was only "about five." Once a right has been acquired—and such a right is similar in principle to a right to mix muck on another's land (*i*), or to place stones on the foreshore for the protection of adjoining land (*j*)—it cannot be extended to cover more or different types of articles. It is submitted that such an easement is to be treated as strictly limited to the terms of the grant—express or implied by prescriptive user—and it cannot be enjoyed, as a consequence of some change in the business carried on

(*f*) See, *e.g.*, *Reilly* v. *Booth* (1890) 44 Ch.D. 12. It seems that the "easement of tunnelling," the right to make a tunnel through another's land, and so described in *S. E. Railway* v. *Associated Portland* [1910] 1 Ch. 24, is not really an easement at all, but confers an estate in the land, amounting virtually to ownership, subject to certain rights reserved to the owner of the land through which the tunnel runs: see, *e.g.*, *Re Pearson* (1900) 83 L.T. 626, and *Bevan* v. *London Portland Cement Co.* (1892) 67 L.T. 615.

(*g*) [1952] C.P.L. 814.

(*h*) *Per* Upjohn J., citing *Moody* v. *Steggles* (1879) 12 Ch.D. 261.

(*i*) *Pye* v. *Mumford* (1848) 11 Q.B. 666.

(*j*) *Philpot* v. *Bath* (1905) 21 T.L.R. 634, and see Gale on Easements, 12th ed., at pp. 31 and 32.

on the dominant tenement, or otherwise, so as to increase the burden on the servient tenement (*k*).

In a case of an easement created by express grant, the extent of the user permitted thereby depends exclusively on the correct construction of the terms of the grant. In *Bulstrode* v. *Lambert* (*kk*), the grant was for the purpose of access with or without vehicles to an auction mart; it was held that such a right must include the right to halt vehicles on the way for the purpose of necessary loading and unloading goods from and for the auction mart.

In *Wright* v. *Macadam* (*l*), a further example of a right to use another's land for storage purposes was recognised as an easement, as between landlord and tenant. In this case, it was said that a right to use another's coal shed for the storage of coals was "a right or easement which the law would recognise"; presumably the quantity of coal to be stored would be limited, on the analogy of *Smith* v. *Gates*, to the quantity in the contemplation of the parties at the time the easement was created. This particular right was held to have been created by an agreement under hand for a period of one year only, this being a "conveyance" (*m*) for the purposes of section 62 of the Law of Property Act, 1925, and so the right was presumed to have passed to the tenant by virtue of that section.

Right to display Advertisements

In *Re Webb* (*n*) it seems that the Court of Appeal recognised that a right to display advertisements on the land of another could subsist as an easement, although on the facts the case for such a right was not upheld in the final outcome. It may be doubted whether in fact such a right could subsist as an easement, as there was no dominant tenement (*o*). The right to exhibit a signboard advertising a public house, the dominant tenement, on the wall of an adjoining house (*p*), or to display a fascia appurtenant to the

(*k*) See *e.g.*, *Harris* v. *Flower* (1904) 74 L.J.Ch. 127.
(*kk*) [1953] 1 W.L.R. 1064.
(*l*) [1949] 2 K.B. 744.
(*m*) "Conveyance" here refers to any instrument whether under seal or not, which has the effect of conveying or creating a legal estate in land (Law of Property Act, 1925, ss. 205 (1) and 52), and it will be remembered that a contract for sale is not within the expression: *Borman* v. *Griffith* [1930] 1 Ch. 493. Under ss. 52 (2) (d) and 54 (2) it is provided that a legal term for a period of less than three years may be created by a document under hand only, not necessarily under seal.
(*n*) [1951] Ch. 808.
(*o*) The existence of a dominant tenement is a *sine qua non* to the existence of an easement, but the dominant tenement may itself be an incorporeal hereditament or a public utility undertaking—a gas or water supply system, etc.: *Re Salvin's Indenture* [1938] 2 All E.R. 498.
(*p*) *Moody* v. *Steggles* (1879) 12 Ch.D. 261.

claimant's house on adjoining property (*q*), has been held to be capable of being an easement, but it is submitted that the right to exhibit a commercial advertisement (as was the case in *Re Webb*) on another's property is not capable of being an easement unless the advertisement relates to the property which is the dominant tenement. An advertisement of the neighbouring public house may be enjoyed as an easement appurtenant to that house; if the public house becomes a tea garden, presumably the existing right may not be used so as to exhibit an additional board (*r*), but may the wording on the existing board be changed so as to relate to the tea garden in place of the former public house? (*s*).

Rights of Way

Rights of way also have figured recently in the courts. By way of a further illustration of the principle that the dominant owner may not increase the burden on the servient tenement by the use he makes of his easement, it was held in *R. P. C. Holdings* v. *Rogers* (*t*) that a way originally acquired for agricultural purposes could not subsequently be used by the owner of the dominant tenement as a means of access to a large camping site installed on his land. On the other hand, the use made of an easement cannot be unduly restricted, and therefore a way acquired for "vehicles" could not subsequently be restricted to vehicles of particular sizes only (*u*). Similarly it was held in *Devlin* v. *Drewry* (*uu*) that a right of way for all agricultural purposes with or without vehicles, could not be restricted so as to exclude particular types of agricultural vehicles.

Ways of necessity are legal concepts well known to elementary law students, but the subject was none the less before the courts in *Barry* v. *Haseldine* (*v*) recently. In this case, the defendant had previously sold off a parcel of land surrounded partly by other land in his, the defendant's, ownership, and partly by land in other ownership, over which other land there was no right of way to

(*q*) *Francis* v. *Hayward* (1882) 22 Ch.D. 177.
(*r*) This would contravene the principle in *Smith* v. *Gates* (*supra*).
(*s*) The answer to this question depends, it is submitted, whether the easement can be regarded as being appurtenant to the dominant tenement for the benefit of a particular business only, or whether the rule is that the burden on the servient tenement may not be increased by reason of the use made of the dominant tenement. It is submitted that the latter is more in accordance with authority (in spite of the observations of Upjohn J. in *Copeland* v. *Greenhalf*, at p. 811) and that the answer to the question put should therefore be in the affirmative.
(*t*) [1953] 1 All E.R. 1029.
(*u*) *Chandler* v. *Harts Motors* (*Markyate*), *Ltd.* [1953] C.P.L. 346.
(*uu*) [1953] C.P.L. 482.
(*v*) [1952] 2 All E.R. 317.

any highway (although a way had been enjoyed for a time by licence of the owner). The purchaser's successor in title claimed a way of necessity over the defendant's land, in order that he might have access to his land from the public highway. The case law was not clear on the point, it being suggested that a way of necessity could be implied in favour of a grantee only where a parcel of land enclosed on all sides by the grantor's land had been granted to another, but in the present case Danckwerts J. settled the point in favour of the grantee on the grounds of "common sense." In principle, there seems no reason why a way of necessity should not also be implied as a reservation in favour of a grantor, in a similar case. It is not clear as to how, or by whom, the exact situation of the way of necessity, where one can properly be implied, is to be determined (*w*); it is submitted that in the absence of any existing defined path (*x*), the person entitled to the way can claim the most direct route from his premises to the nearest public highway (*y*).

Walsh v. *Oates* (*z*) is another example of a modern decision being necessary to establish a point which most practising lawyers would have said, before carrying out any research, was already established. In this case an order had been made under the Highway Act, 1835, stopping up a portion of a public highway, over which the plaintiff claimed a private right of way. The court below had held that the order of quarter sessions had had the effect of extinguishing any private right of way that might have existed, as well as the public rights, but the Court of Appeal held that extinction of the public right did not *ipso facto* extinguish the private right, as both a private right and a public right could co-exist independently along the same road at the same time. The only previous decision that had seemed to establish this point (*a*), turned on different facts and on the construction of a special statute.

The co-existence of a private right and a public right over the same way was also recognised in *Devlin* v. *Drewry* (*supra*), where it was held that in such a case the private way took effect subject to the rights of the public and that, therefore, the private user had to

(*w*) The author is indebted to the learned editor of this journal for the information that in Roman-Dutch law the owner of the servient tenement is, in effect, entitled to select the site of the way, for it is sufficient if he leaves a convenient route of communication open.

(*x*) After all, the whole doctrine of the implication of a way of necessity depends on the implied intention of the parties.

(*y*) See Parke B. (*obiter*) in *Osborn* v. *Wise* (1837) 7 C. & P. 761; if there is a choice of possible ways, it seems that the grantee is entitled to one only, which the grantor may select: *Bolton* v. *Bolton* (1879) 11 Ch.D. 968.

(*z*) [1953] 1 All E.R. 963.

(*a*) *Wells* v. *London, Tilbury and Southend Ry. Co.* (1877) 5 Ch.D. 126.

be reasonable, having regard to the circumstances, and so as not to conflict with the rights of the public. In this case the plaintiff claimed to bring lime-spreaders of considerable size along the way. It was held that whereas the easement clearly included such vehicles, they should not be brought along the way at times or in such manner as to render the way impassable to the public. In such cases therefore, it seems that the mode of user of a right of way, unrestricted in the grant itself, may be qualified as a consequence of the co-existence of public rights.

It has for a considerable time been recognised that the owner of a dominant tenement must take his right of way as he finds it, and that he cannot compel the owner of the servient tenement to keep the way in repair (*b*). On the other hand, the dominant owner will be liable for any actual damage he causes to the servient owner's land as a consequence of the exercise of his rights conferred by the easement (*c*); but this does not mean that the servient owner can compel him to keep the way in repair (*d*). Neither party can sue the other if the way becomes foundrous; if the dominant owner wants the way repaired, he must carry out the repairs himself, and he has, by necessary implication, the right to carry out works to that end (*e*).

(*b*) See, *e.g.*, *Duncan* v. *Louch* (1845) 6 Q.B. 909.

(*c*) *Ingram* v. *Morecraft* (1863) 33 Beav. 49.

(*d*) This was so explained in the recent case of *London Cemetery Co.* v. *Cundey* [1953] 1 W.L.R. 786. In this interesting case the defendants, who were the owners of a right of exclusive burial in a certain plot in the plaintiff company's cemetery, were held not responsible for the maintenance of a tree standing on that plot. It was attempted to argue by analogy with the law of easements that as the defendants were entitled to the benefit of the tree, they were liable to maintain it; this argument was discounted by McNair J. on two grounds, first, because the law of easements did not apply, and, secondly, because even if that law had applied, the principle that the owner of the servient tenement can compel the owner of the easement to keep the subject-matter in repair was unsound.

(*e*) See Gale on Easements, 12th ed., pp. 431 *et seq.*

REPAIRS TO FIXED EQUIPMENT AND THE SETTLED LAND ACT

A NOTE ON

Re Lord Brougham and Vaux's Settled Estates

By E. H. Scammell, Barrister-at-Law

For the third time in just over two years, the scope of paragraph 23 of the Third Schedule to the Agricultural Holdings Act, 1948, (hereafter referred to as the A.H.A.) and its relation to settled land has been the subject of a reported decision. In the most recent case, *Re Lord Brougham and Vaux's S.E.* [1953] 3 W.L.R. 465; [1953] 2 All E.R. 655, the tenant for life of agricultural land had assigned his equitable life interest to the trustees of the settlement upon certain trusts. In June, 1948, the *trustees* agreed to let part of the settled land comprising (inter alia) two farms, to a company for one year certain and thereafter from year to year, the tenant for life being joined and being expressed to be "surety." Soon after the tenancy agreement had commenced, the tenant for life caused certain works to be executed on the two farms, including repairs to fixed equipment for the execution of which the tenant company was contractually responsible. The question raised was whether the cost of such repairs was payable out of capital moneys under section 73 (1) (iv) of the Settled Land Act, 1925, which, as amended by the A.H.A., s. 96 (1) (a), authorises capital money to be applied "in payment as for an improvement authorised by this Act of any money expended and costs incurred by a landlord . . . in or about the execution of any improvement comprised in the Third Schedule" to the A.H.A. Paragraph 23 of this Schedule lists as an improvement, "Repairs to fixed equipment, being equipment reasonably required for the proper farming of the holding, other than repairs which the tenant is under an obligation to carry out." The trustees of the settlement contended that these provisions were not applicable (i) because the tenant for life (who had expended the money) was not acting as a "landlord" within the meaning of the Settled Land Act, 1925, s. 73 (1) (iv), and (ii) because the repairs to fixed equipment in question were repairs for which the tenant company was responsible and were therefore excluded from paragraph 23 of the Third Schedule to the A.H.A. Vaisey J. in giving judgment for the applicant, the tenant for life, held (i) that

the tenant for life satisfied the description of " landlord " as construed in *Re Duke of Northumberland* [1951] Ch. 202, since (and this is the extent of the report on this point) he was " a person having the statutory powers "; (ii) that the words " other than repairs which the tenant is under an obligation to carry out " contained in paragraph 23 were not to be imported into the Settled Land Act, 1925, s. 73 (1) (iv) on the ground that, for the purposes of extending the list of improvements authorised by the Settled Land Act, the A.H.A. should not be regarded as concerning itself with the relationship between landlord and tenant.

Concerning the first part of the decision, it had been decided by Vaisey J. in *Re Duke of Northumberland*, that the word " landlord " in section 73 (1) (iv) did not mean " the person between whom and a tenant the relationship of landlord and tenant exists " but meant, simply, the " person for the time being entitled to receive the rents and profits of any land." This being so, it is clear that the tenant for life in the present case could properly be described as a " landlord " since notwithstanding the assignment of his equitable life interest, he remained the legal owner and therefore the person entitled to the rents and profits of the settled land, *cf. Schalit* v. *Nadler* [1933] 2 K.B. 79. In fact it appears that as against the tenant for life, unless some principle of estoppel operated, the tenant company had no *locus standi* whatever : Settled Land Act, 1925, s. 104.

With regard to the blue-pencilling, for the purposes of section 73 (1) (iv), of the last qualifying words in paragraph 23, some difficulty would seem to be presented. In the first place, Harman J. in *Re Sutherland's S.T.* [1953] 2 W.L.R. 1163, had said, " So one must therefore find, in order that paragraph 23 of Part II of Schedule III shall apply, that the repairs are not repairs which the tenant is under an obligation to carry out." No reference to this dictum appears in the report of *Re Lord Brougham and Vaux's S.E.* Secondly, there are those who hold that section 73 (1) (iv) (incorporating paragraph 23) authorises the application of capital money in payment of *compensation* to a *tenant* who has carried out any of the specified improvements (*a*). This is contrary to the opinion of the present writer (*b*), but if correct, would necessarily require paragraph 23 to be incorporated *in toto* into section 73 (1) (iv) and it could hardly be incorporated for one purpose and not for another. Thirdly, it is

(*a*) *e.g.*, Halsbury, Laws of England, Hailsham ed., Vol. I, p. 358 (marginal note); Spencer, The Agricultural Holdings Act, 1923, 8th ed., p. 80; Mackeson, *The Conveyancer*, Vol. 14, p. 57.

(*b*) For the arguments, see *The Conveyancer* (1951), Vol. 15, pp. 415-418.

suggested that in reading the provisions of the Third Schedule to the A.H.A., it may be relevant to keep in mind the duties of good estate management and husbandry which are imposed by sections 10 and 11 of the Agriculture Act, 1947. In this connection, the liability of an owner (including a tenant for life) of agricultural land is to provide, improve and repair fixed equipment with the threat of a supervision order being made in default : Agriculture Act, 1947, s. 12. In the light of this liability, the provisions of paragraph 23 do not appear so revolutionary as when taken by themselves, for since, at common law, a tenant for life is not liable for permissive waste (*Re Cartwright* (1889) 41 Ch.D. 532) it may perhaps be regarded as reasonable if, upon statutory inroads being made upon this immunity, provision is also made for the discharge of the statutory duties out of capital moneys. If this can be regarded as the principle behind paragraph 23 of the Third Schedule to the A.H.A., then it would seem to require that paragraph to be taken *en bloc*, for, where a tenant under an agricultural lease is under an obligation to carry out repairs to fixed equipment, this exonerates the tenant for life, *vis-à-vis* the County Agricultural Executive Committee, from liability in respect of such repairs. Fourthly, even assuming that the qualification at the end of paragraph 23 had not been inserted by the legislature it is conceived that some such qualification ought to be read into it on the basis of the tenant for life's trusteeship of both his powers (Settled Land Act, 1925, s. 107) and the settled land (Settled Land Act, 1925, s. 16). If, although certain given works would clearly constitute authorised improvements, a tenant of the settled land holding under a lease has covenanted to execute precisely such works at his own expense, ought not the tenant for life, as trustee, to seek, in the first instance, to enforce the tenant's covenant before seeking an application of capital money to carry it into effect? *Cf.* Harman J. in *Re Sutherland's S.T.*, *supra*, at p. 1173; *Re Kingcome* [1936] Ch. 566. Moreover, the likelihood is that the existence of such obligations on the tenant will have placed at a lower point the "best rent" reasonably obtainable.

For the above reasons it is submitted with great respect that paragraph 23 of the Third Schedule to the A.H.A. should have been taken as a whole in applying The Settled Land Act, 1925, s. 73 (1) (iv). Such a conclusion must also have done less violence to the established canons of statutory construction.

NEGLIGENCE IN THE EXAMINATION OF TITLE—COVENANTS FOR TITLE

A NOTE ON

Pilkington v. *Wood*

By S. M. Tolson, Barrister-at-Law

Pilkington v. *Wood* [1953] 3 W.L.R. 522; [1953] 2 All E.R. 810, is a case which is of considerable interest on several grounds. In particular the observations of Harman J. concerning the scope of the covenants for title implied in a conveyance for value by section 76 and Sched. II of the Law of Property Act, 1925, will be received with considerable surprise by many members of the profession. Harman J. said, in effect, that such covenants may not protect a purchaser if the vendor is not in fact what he is expressed to be in the conveyance, for example, the "beneficial owner."

The facts of the case were that the plaintiff had purchased the freehold property in question in 1950, and the defendant had acted as his solicitor. The vendor had purported to convey as beneficial owner, but when the plaintiff himself attempted to resell the property in 1951, he discovered that his vendor had in fact been a trustee who had committed a breach of trust by purchasing the property for himself. Although this is not a common defect in title, which would probably account for the defendant not noticing it, the law on the subject is perfectly clear. A trustee is absolutely disabled from purchasing any trust property directly in his own name or indirectly through someone else, unless there is either an express power in the instrument or he obtains the leave of the court. The principle is that a trustee's duty and interest must not conflict: see Underhill on Trusts, 10th ed., p. 379; Lewin, 15th ed., pp. 797 *et seq.* When a trustee has himself purchased and this fact is subsequently discovered, the beneficiaries may demand that the trust property be reconveyed to them by the trustee, or, in a case when the facts are like those in *Pilkington* v. *Wood*, by a purchaser who had taken from the trustee with notice. The beneficiaries must pay the price which the trustee paid together with interest at 4 per cent., and the trustee or purchaser must account for the rents and profits of the estate, or if he was in actual

occupation, pay an occupation rent. In *Pilkington* v. *Wood* the class of persons claiming under the will of which the vendor was trustee was not closed, and probably included infants and persons unborn. Thus the defect in title was no mere technicality, but on the contrary there was a real possibility that any purchaser taking the property with notice might be dispossessed. The defect in this case was, of course, very obvious, but the conveyancer should perhaps keep his sharpest watch for the trustee who has himself bought from a purchaser from the trust upon an understanding as opposed to a mere expectation that the purchaser will resell to him. Generally, of course, there is nothing to prevent a trustee purchasing trust property already sold and for which the best price was obtained.

In *Pilkington* v. *Wood* the defendant admitted his negligence, and the only question in issue in the action was as to the quantum of damages. It was alleged by the defendant that it was the plaintiff's duty before suing him to mitigate the damage by first suing the vendor under his covenants for title as beneficial owner, provided always that the defendant gave security for costs, and that the vendor was solvent and there was a good prima facie right of action against him. Harman J. referred to *British Westinghouse Electric and Manufacturing Co., Ltd.* v. *Underground Electric Rys. Co. of London* [1912] A.C. 673, and applying the words of Scrutton L.J. in *Payzu* v. *Saunders* [1919] 2 K.B. 581, at p. 589, said he thought that the plaintiff had no duty as " a reasonable man " to minimise his loss by bringing the action suggested. Harman J. said, " I am of opinion that the so-called duty to mitigate does not go so far as to oblige the injured party, even under an indemnity, to embark on a complicated and difficult piece of litigation against a third party. The damage to the plaintiff was done once and for all directly the voidable conveyance to him was executed. [See *Turner* v. *Moon* [1901] 2 Ch. 825.] This was the direct result of the negligent advice tendered by his solicitor, the defendant, . . . and in my judgment, it is no part of the plaintiff's duty to embark on the proposed litigation in order to protect his solicitor from the consequences of his own carelessness."

It does not seem surprising that the learned judge also dismissed the suggestion that the injury might be mitigated by a policy of insurance to cover the consequences of the defect, for there was no evidence that such a policy could be obtained, nor if it were, would the property become more attractive to a new purchaser. Policies of this kind are found apparently, only when there are cross covenants by the author of the defect, and in *Pilkington* v. *Wood*

the vendor was, of course, not willing to enter into any such arrangement.

As quoted above Harman J. said that the litigation which the defendant was asking the plaintiff to undertake was of " a complicated and difficult " nature and the learned judge thought that this was so on two grounds. First, it was doubtful if there had been any breach of covenant at all by the vendor within the " extremely difficult " words implied by section 76 and Sched. II of the Law of Property Act, 1925, and, secondly, and this is the most arresting part of the judgment, it was doubtful if the covenant had ever come into operation at all " it being a *sine qua non* that the covenantor must be in fact, as well as being expressed to be, the beneficial owner," and he referred to the observations of Sir Wilfrid Greene M.R. in *Fay* v. *Miller, Wilkins & Co.* [1941] Ch. 360, at p. 363. In that case Sir Wilfrid Greene M.R. was discussing the covenant implied in an assurance as personal representative and said, " the limited statutory covenants for title are only imported when the grantor both conveys in the capacity of personal representative and is expressed to convey as such." In both cases the judges were apparently relying on the actual wording of section 76, but if these opinions are correct it means very shortly that, contrary to the generally accepted view, the covenants for title are useless when the vendor conveys other than in his true capacity. It is submitted that this is a misapprehension which has arisen recently, and that the contrary view that such covenants are enforceable in all cases is supported by binding authority.

On a consideration of the authorities, it seems clear that originally, whenever possible, the full covenants for title were expressly given in every conveyance in order to enhance the marketability of the property. After the Conveyancing Act, 1881, the same practice continued, and the vendor without regard to the nature of his ownership would usually convey as " beneficial owner " under section 7 (1) (a) of that Act.

In *Re Ray* [1896] 1 Ch. 468 the Court of Appeal held that section 124 of the Lunacy Act, 1890, gave the court jurisdiction to authorise the committee of a lunatic when selling a life interest on his behalf to enter into the full covenants for title as beneficial owner. Kay L.J. said, at p. 474, " the Conveyancing Act of 1881 does, I confess, give rise to some little difficulty. That Act provides, by section 7 (1) (a), that in a conveyance for valuable consideration other than a mortgage certain covenants are to be implied on the part of a person who conveys, and is expressed to convey, " as beneficial owner," and these are the usual covenants for title. It is rather difficult to say that a tenant for life under

the Settled Land Act conveys the fee simple "as beneficial owner." That he may be expressed to convey as beneficial owner I can understand: but perhaps it is expedient to give this clause of the Conveyancing Act a wide meaning, for its main object was no doubt to prevent the necessity of setting out all these covenants at length, so that, when a person conveys as beneficial owner and is expressed to convey as beneficial owner, these covenants should be implied. It is a sort of compendious mode of bringing these covenants into the conveyance where they are not set out at length." There is a similar observation by Lindley L.J. at p. 472, and Smith L.J. said that it was the duty of a tenant for life to obtain the best price which he could not do unless he gave the full covenants.

In *Parker* v. *Judkin* [1931] 1 Ch. 475 the question was whether property charged with the payment of an annuity by will had been sold in 1923 by the executors as such, overriding the annuity, or as beneficiaries, subject to it. It was held by the Court of Appeal, following *Re Venn and Furze's Contract* [1894] 2 Ch. 101, that the mere fact that the executors had conveyed "as beneficial owners" did not prevent the purchaser from being entitled to assume the executors were selling as executors. In other words, these authorities say that before 1925 if a vendor was expressed to convey "as beneficial owner," it was no real indication of how he had actually conveyed.

Finally, there is *Wise* v. *Whitburn* [1924] 1 Ch. 460, a case directly covering the point in *Pilkington* v. *Wood*, in which Eve J. without the slightest hesitation or reference to authority, held that the vendors were liable on their covenants for title as they had purported to convey as executors when in fact at the time of the sale they had become trustees without any power of sale over the property.

It does seem quite clear that section 7 (1), like section 6 (1) (general words implied) of the Conveyancing Act, 1881, was always regarded as a statutory shorthand form to reduce the length of conveyances. It appears that any vendor might convey as "beneficial owner" if he wished to do so, and there was never any suggestion that the covenant might not be valid if the vendor could not convey in the capacity in which he was expressed to convey, even if in fact he could not convey at all.

It seems that there is no reason to believe that the law was changed by the re-enactment of section 7 (1) of the Conveyancing Act, 1881, by section 76 (1) and Sched. II of the Law of Property Act, 1925, for the wording is identical, the covenant being implied "by a person who conveys and is expressed to convey . . . ," and

it would seem that the old view is still maintained by the textbook authorities. Key & Elphinstone, 14th ed., Vol. 1, at p. 589, para. 8, says, " the statutory covenants extend to the whole fee simple or other estate or interest expressed to be conveyed by the implied covenantor, whatever his actual estate or interest may be or may appear to be on the face of the conveyance "; and see also Williams on Vendor and Purchaser, 4th ed., at p. 1078. On these authorities it does therefore seem, with respect, that both Sir Wilfrid Greene M.R. and Harman J. made their observations on the apparent meaning of the words used in the section without any detailed consideration.

To return to Harman J.'s judgment in *Pilkington* v. *Wood*, the learned judge said in discussing the amount of the general damages, that the plaintiff was under no duty to resell in order to quantify the amount, as the defendant had persisted for a long time in denying his negligence. He assessed the general damage at the difference between the market value of the property at the time of the breach with a good title and the market value it would have then had with a defective title. This is the principle usually applied: see Williams on Vendor and Purchaser, 4th ed., at p. 1088; *Turner* v. *Moon* (*supra*); *Lake* v. *Bushby* [1949] 2 All E.R. 964. It is to be noticed that the difference is not between the *price paid* and the value of the property as actually conveyed, but the difference between the value if conveyed as purported and the actual value, though generally, as in *Pilkington* v. *Wood* it will be accepted that the price paid was the market value of the property with a good title.

Finally, in addition to general damages, the plaintiff also claimed special damages under a variety of heads. The plaintiff was not a wealthy man, for, unknown to the defendant, he had completed the purchase of the property in the dispute by means of an overdraft, and he had wished to sell the property because he had changed his place of employment to another place much more distant from his home. As a result of being unable to sell he could not purchase another house for himself and his family, and he therefore sought to recover the cost of hotel expenses and the running of his car to and from his home at weekends, and also the additional expenses on the overdraft which would otherwise have been paid off. Harman J. referred to *Victoria Laundry (Windsor) Ltd.* v. *Newman Industries, Ltd.* [1949] 2 K.B. 528, and said that none of the items claimed was within the second rule in *Hadley* v. *Baxendale* (1854) 9 Exch. 341, since they were not within the reasonable contemplation of the parties when the defendant assumed the duty of advising the plaintiff. In effect the defendant

was being asked to pay for the consequences of the plaintiff's impecuniosity, and such damage is clearly not recoverable: *Liesbosch Dredger* v. *S.S. Edison* [1933] A.C. 449.

The damages in this case were, of course, assessed under the rules applicable to an action in contract, since it is of long standing authority that a solicitor's duty of care lies solely in contract, and the damages for negligence are therefore limited by the rule in *Hadley* v. *Baxendale* (*supra*): see *Davies* v. *Lock* (1844) 3 L.T. (o.s.) 125; Sir Wilfrid Greene M.R. in *Groom* v. *Crocker* [1938] 2 All E.R. 394, at p. 402; and *Lake* v. *Bushby* (*supra*).

NOTES OF RECENT CASES

1. *LAW OF PROPERTY AND CONVEYANCING*

By S. M. Tolson, Barrister-at-Law

Bulstrode v. *Lambert* [1953] 1 W.L.R. 1064; [1953] 2 All E.R. 728

Right of way—express reservation—"pass and repass"—right to halt.—The reservation was contained in a conveyance made in 1944 by the plaintiff's predecessor in title, and ran as follows, "reserving unto the vendor his tenants and workmen and others authorised by him the right to pass and repass with or without vehicles over and along the land coloured brown . . . for the purpose of obtaining access to the building at the rear of the said premises and known as the auction mart."

The plaintiff owned the house adjoining the defendant's and behind the plaintiff's house was the auction mart. The main access to the mart was along a wide drive beside the plaintiff's house, but access was also to be had to a small door in the mart by a narrower passageway alongside the defendant's house ("the land coloured brown"). Until 1951 this second entrance was kept obstructed by wooden gates, but after these were moved, to the defendant's great inconvenience, the plaintiff used the second entrance whenever the main entrance became congested, and vans would stand for considerable periods outside the entrance to load and unload. The plaintiff brought the action to determine the extent of his rights under the reservation.

Upjohn J. found that the plaintiff was acting fully within his rights. First, the plaintiff was not prejudiced by the fact that the right of way had not been used for seven years (see *Keewatin Power Co., Ltd.* v. *Lake of the Woods Milling Co., Ltd.* [1930] A.C. 640 at p. 657) as there was no question of abandonment.

Secondly, it could not be argued that the easement was for the passage of persons only and not for goods nor for vehicles which would have been too big to pass the gates. The words of the reservation were perfectly plain and unambiguous, and the circumstances at the date of the grant could not affect them (see Gale on Easements, 12th ed., at p. 315). As the right of way was expressly to a place used for business purposes, the right included use for reasonable purposes sufficient for the purposes of the business (see *per* Sir George Jessel M.R. in *Cannon* v. *Villars* (1878) 8 Ch.D. 415 at p. 421).

Finally, the learned judge held that the plaintiff was impliedly entitled to stop his vehicles to load and unload them as otherwise his right of way would be virtually useless. He applied the principle of Lord Parker of Waddington in *Pwllbach Colliery Co., Ltd.* v. *Woodman* [1915] A.C. 634 at p. 646, where he said: " . . . the implication

arises because the right in question is necessary for the enjoyment of some other right expressly granted." The learned judge found this point of some difficulty as it was without direct authority. Reference might well have been made to *Michael Borys* v. *Canadian Pacific Ry.* [1953] 2 W.L.R. 224, see note *ante*, p. 148, where the Judicial Committee came to the same conclusion in a very similar difficulty.

Pilkington v. *Wood* [1953] 2 W.L.R. 522; [1953] 2 All E.R. 810

This case is discussed on p. 407.

Rosenfield v. *Newman* [1953] 1 W.L.R. 1135; [1953] 2 All E.R. 885

Trespass—estoppel—election to abandon claim.—The Court of Appeal have settled very satisfactorily the unhappy situation which had arisen in this case at first instance and previously in the county court: [1953] 1 W.L.R. 558 (see *ante*, p. 236). As the learned Master of the Rolls observed, it was indeed a Gilbertian situation, for Parker J. had held that the plaintiff had abandoned the right to assert that which the county court judge found as a fact, *viz.*, that the defendants had no right or title to the premises.

The Court of Appeal came to the conclusion that the authorities such as *Scarf* v. *Jardine* (1882) 7 App.Cas. 345, concerning the abandonment of inconsistent rights or claims did not apply to the case at all, but the difficulties had arisen in the county court owing to lack of precision as to what were the issues which were being fought.

The plaintiff's alternative claim upon which he had elected to proceed, alleged not that the defendants were in possession of the premises under a contract, but, in anticipation of a defence under the Rent Acts, that they had obtained possession under an unlawful subletting or assignment and had no right to remain there. The alternative claim was therefore not inconsistent with the claim in trespass which had thus not been abandoned. It followed that the plaintiff was not estopped from alleging that the defendants were trespassers, and as it had been found as a fact in both courts below that the defendants had no right or title to the premises, an order for possession was made against them.

Hawkins v. *Coulsdon and Purley U. D. C.* [1953] 1 W.L.R. 882; [1953] 2 All E.R. 364

Occupier's duty to licensee—knowledge of risk.—Pearson J. has settled a problem which has long been a matter of speculation, namely: to what extent the occupier of premises "ought to know" of concealed dangers likely to injure licensees upon those premises. The learned judge, who in view of the great weight of earlier conflicting authority was reluctant to come to a decision, said, "The licensor is

not liable if, through lack of adequate inspection, he has failed to ascertain the existence of the physical facts which constitute the danger. But if the licensor does know of the physical facts which constitute the danger, and a reasonable man, having that knowledge, would appreciate the risk involved, the licensor is not excused by his own failure to appreciate the risk involved."

The result of this case is that the occupiers of premises who fail to consider the risk of injury arising from defects upon their premises of which they have knowledge, do so at their peril.

The difference between the occupier's duty to licensees and to invitees in this respect should be appreciated. As regards licensees the occupier is expected to have realised the risk of injury only, but as regards invitees, the law implies knowledge of the physical circumstances creating the risk.

Acton Corporation v. *Morris* [1953] 2 All E.R. 932

Requisition—duration—trespass by owner.—The Court of Appeal decided that the procedure laid down for the extending of a period of requisition of premises for more than one month under Circular No. 2082 made by the Minister of Health under Defence Regulations, 1939, reg. 51, had not been complied with, and therefore the requisition had terminated. Somervell L.J. said, " the principle to be applied is that those who are exercising special powers to take private property, must see that they carry out accurately and in detail the Act of Parliament " concerned.

Unfortunately, as the requisition was held to be no longer in force, the real point of interest in the case did not arise for discussion. The plaintiffs had claimed damages for trespass from the defendant owner, who had installed his own tenant on one floor of the premises and excluded the plaintiff's tenants by putting a new lock on the door to which the plaintiffs had no key.

It seems on the present state of the authorities that the court would have found for the plaintiff. See *Erith Corporation* v. *Holder* [1949] 2 K.B. 46. Denning L.J. said in *Lewisham Borough* v. *Roberts* [1949] 2 K.B. at p. 622, that a requisitioning authority has all rights incident to possession, but Somervell L.J. said in the present case that he thought that the authority probably has a right of access only.

Graff Brothers Estates, Ltd. v. *Rimrose Brook Joint Sewerage Board* [1953] 2 All E.R. 631

Support—general indorsement on writ—statement of claim—change in cause of action—R.S.C., Ord. 2, r. 1; Ord. 3, r. 2.—The Court of Appeal held that where a writ is indorsed generally as a " claim for damages for wrongfully taking away the support of the plaintiff's land and houses," it is sufficient to cover alternative claims in the statement of claim for nuisance, negligence, trespass and withdrawal of support. Their Lordships said that the writ in the action

showed the nature of the complaint, and the statement of claim did not introduce a new cause of action or a new case, but having pleaded the facts, it set out in different ways the nature of the remedies which were sought.

Bewlay & Co., Ltd. v. *London County Council* [1953] 1 W.L.R. 1110; [1953] 2 All E.R. 821

Dangerous structure—notice to "take down, repair or otherwise secure"—London Building Acts (Amendment) Act, 1939, *s.* 64 (1).—In this case stated to the Queen's Bench Division, it was decided that on a complaint before a court of summary jurisdiction made by the L. C. C. under section 64 of the London Building Acts (Amendment) Act, 1939, for failure to comply with a dangerous structure notice requiring the owner of premises to "take down, repair or otherwise secure" the premises, the court can in its discretion order that one only of the three alternatives shall be carried out.

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2. *TRUSTS*

Re Lord Brougham and Vaux's Settled Estates [1953] 3 W.L.R. 465; [1953] 2 All E.R. 655

This case is discussed on p. 404.

Re Merton [1953] 1 W.L.R. 1096; [1953] 2 All E.R. 707

Power of appointment—purchase by appointor of appointee's interest—fraud.—There is no inflexible rule where the donee of a power of appointment stands in the relationship of parent to the appointee, that the donee who appoints in favour of the child and then purchases the child's interest, cannot benefit thereby beyond the amount of the child's interest in default of appointment (*cf.* Farwell on Powers, 3rd ed., at p. 463). On the contrary, decided Wynn-Parry J. in this case, applying the words of Lord Parker in *Vatcher* v. *Paull* [1915] A.C. 372 at p. 378, the court is directed to inquire in each case what is the purpose and intention of the appointor; and if, and only if, it appears from the evidence that the object was to secure a benefit for the appointor himself or for some other person not an object of the power, is the transaction to be held to be invalid. The learned judge said that the recent case of *Re Dick* [1953] 2 W.L.R. 477 (see note *ante,* p. 151) confirmed that this was the correct principle, and that the older authority of *Smith* v. *Lord Camelford* (1793) 2 Ves. 698 was not inconsistent with it. It is to be noted that this is contrary to the statement concerning *Smith* v. *Lord Camelford* (*supra*) in Farwell on Powers at p. 463.

In the present case the appointor had three children who were objects of the power, of whom one was of unsound mind and for whom the appointor had made a handsome provision separately. The appointor therefore exercised the power irrevocably in favour of the other two children, and being advised that it would benefit her children by avoiding estate duty, she purchased the appointed shares from the children in excess of the market value. The learned judge held, applying the principle above, that the transaction was entirely valid, being designed to benefit the objects of the power only.

Re Livesey [1953] 1 W.L.R. 1114; [1953] 2 All E.R. 723

Settlement—portions—satisfaction by sums for "advancement or preferment in the world"—effect of testamentary bounty.—The relevant clause in this case was similar to that contained in Key & Elphinstone's Precedents, 14th ed., Vol. II, at p. 471, which very surprisingly for a clause of its considerable history suffers from a complete dearth of authority. The settlement provided that if the settlor "should give or secure" to any child for whom a portion was intended to be provided "any sum or sums (for purposes which did not arise) or otherwise for his or her or their advancement or preferment in the world" then unless the settlor directed otherwise in writing such sum or sums should be taken in satisfaction for the portion. By his will the settlor had left to each of two of his three children certain freeholds and also certain mortgage investments, and the question arose as to how these gifts were to be dealt with having regard to the provision in the settlement.

Roxburgh J. held that there was no satisfaction. He said first that it was clear on authority that the clause did apply to testamentary dispositions and secondly that as far as appeared in the will, the gifts were mere testamentary bounty. The question, therefore, was, did the words "or otherwise for their advancement or preferment in the world" include mere testamentary bounty? His Lordship referred to *Onslow* v. *Mitchell* (1812) 18 Ves. 490, and he pointed out that the point in issue before him was not considered in that case as the real contest there was over the effect of the words "in their lifetime," nor, said his Lordship, had the point received any direct attention in the later cases which all concerned clauses containing the much wider word "benefit." However, he thought it was clear as a result of *Lowther* v. *Bentinck* (1874) L.R. 19 Eq. 166 that "advancement or preferment in the world" meant something more restricted than mere testamentary bounty, and therefore in the present case there was no satisfaction.

In effect therefore, clauses with this wording make the purpose for which the sums are given the true test as to whether there shall be satisfaction or not.

Antony v. *Weerasekera* [1953] 1 W.L.R. 1007

Undue influence.—Tufton v. *Sperni* [1952] 2 T.L.R. 516 (see Vol. 16, p. 381) was referred to in this case before the Judicial Committee. In the present case the allegation of undue influence was

dismissed on the facts, but it was said that it was clear, as a result of the observations of Evershed M.R. in *Tufton* v. *Sperni* (*supra*), that a person in whom confidence is reposed need not be in one of the recognised categories in order that the doctrine should apply to him, but that circumstances can give rise to a relationship between two parties which makes it the duty of one party to take care of the other, and that that duty of care includes the duty of giving advice.

It can be seen that the ambit of the doctrine of undue influence has been shown in *Tufton* v. *Sperni* (*supra*) to be considerably wider than was thought previously (see, for example, Chitty on Contracts, 20th ed., p. 565, and Hanbury's Modern Equity, 6th ed., pp. 694 *et seq.*), and we can now expect that it will be invoked more frequently. Although the existence of the jurisdiction depends in each case upon the particular facts, it will be interesting to see what kind of circumstances will be found to give rise to a relationship subject to the duty of care.

Re Pilkington Brothers, Ltd., Workmen's Pension Fund [1953] 1 W.L.R. 1084; [1953] 2 All E.R. 816

Corporate trustee—Friendly Societies Act, 1896.—Danckwerts J. decided that there is nothing in the Friendly Societies Act, 1896, to exclude the rule that a "person" includes a corporate body, and accordingly a registered friendly society may appoint a corporation as its sole trustee. His Lordship did not follow *Re West of England and South Wales District Bank, ex p. Swansea Friendly Society* (1879) 11 Ch.D. 768, where Fry J. decided that under the earlier Friendly Societies Act of 1875 a friendly society could not appoint a corporate treasurer. In section 35 of the later Act of 1896 the "trustees" appear to be distinguished from the "officers" of a friendly society, and therefore Danckwerts J. did not think that the earlier case was a compelling authority against the appointment of a corporate trustee.

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3. *CHARITIES*

By A. Kiralfy, Barrister-at-Law

Re Marshall, Upjohn J., July 23, 1953 (*The Times,* July 24)

Permanent nature of charity—applicability of capital and income.—Inflation and increased revenue demands have often led to a bequest being inadequate for the purpose for which it was intended. Where charity is its object it will be urged that the bequest be applied *cy-près,* if there is a general charitable intention. But it is often possible to achieve the founder's purpose for a time, at least, rather than substitute some different object. The privilege, which charities enjoy, of perpetuity, has led to the unjustified corollary that all

charities must be perpetual. The decision in the present case is a corrective to this tendency. Dr. F. H. A. Marshall left the capital and income of his residuary estate to found a Marshall Chair of Physiology of Reproduction. The income of his estate was insufficient to pay a professor's stipend. The learned judge held that capital, as well as income, could be used to provide a suitable stipend. The inevitable result would be that after some years the Chair would cease to be endowed. It was therefore argued that the use of capital was inappropriate and that professorships of this kind were intended to be permanent. This argument failed. In cases of this kind the alternative is often an application to the general purposes of a university, or, at least, of the department of the university in which the Chair would have been created. There appears to be no reason why the founder's intention should not be carried out, rather than take unnecessary liberties with it.

Re Little [1953] 1 W.L.R. 1132; [1953] 2 All E.R. 852

Transfer of charitable trust to hospital service.—The instant case does not appear to raise any new point. Residue of an estate was left on trust for the trustees of the C. Hospital, to be added to its building funds. Under the Act of 1946 the Minister of Health acquired the C. Hospital and it was being administered by a Hospital Management Committee. Vaisey J. held, following *Re Morgan* [1950] 1 All E.R. 1097, that the gift should be paid to the Committee on trust for building purposes at the C. Hospital. The change of administration had not destroyed the identity of the charity.

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4. *WILLS*

By A. Kiralfy, Barrister-at-Law

Re Herwin [1953] 3 W.L.R. 530; [1953] 2 All E.R. 782 (C.A.)

Will—construction—" children "—illegitimate children included.—The testator made his will in 1949 and died in 1950 without leaving any legitimate children. He gave the residue of his estate to his " children." It is clear that he might have contemplated having future children in 1949. The fact that he already had three illegitimate children was therefore not conclusive. But evidence was admitted that the testator knew when he made his will that he was incapable of having any further children. It was therefore held that the three illegitimate children must have been intended to take. This is a decision following *Re Wohlgemuth* [1949] Ch. 12. The three children were his children by his second wife but they had been born during his first marriage, and so could not be legitimated, in view of the restriction in section 1 (2) of the Legitimacy Act, 1926. The new point in the instant case was the ruling of the Court of Appeal that

fresh evidence might be adduced which was not brought before the judge at first instance. This was not a hostile action but a proceeding for the advice of the court on the administration of an estate, and considerations applicable to hostile actions did not apply. In any case it is difficult to see how the three children could have had this evidence in their possession. Though it altered the complexion of the case it was not the sort of evidence that would be sought for. The decision emphasises the difference in nature between an originating summons and an action.

(Theobald 216, 217.)

Re Allen [1953] 3 W.L.R. 637; [1953] 2 All E.R. 898 (C.A.); *Re Wolffe* [1953] 1 W.L.R. 1211; [1953] 2 All E.R. 697

Conditions precedent—religious faith—racial qualifications.—The ruling of the House of Lords in *Clayton* v. *Ramsden* [1943] A.C. 320, that a person might marry a Scottish Presbyterian and not forfeit a gift which was to go over on marriage to a non-Jew, is not an example of the occasional alliance of law with common sense. It supports the view, that a court of law is ill adapted to deal with common sense, advanced in the documents cited by the Committee on Charitable Trusts (Cmd. 8710, 1952, p. 83). A similar line of cases had led to the ruling that it was beyond the wit of man to recognise a member of the Church of England. As Birkett L.J. put it (*Re Allen* [1953] 3 W.L.R. 649): "It seems to me to be a very strange conclusion that when millions of people claim to be and are recognised to be members of that Church this court should say that the words employed by this testator are so uncertain in their meaning as to be void." On the other problem Harman J. adds (*Re Wolffe* [1953] 1 W.L.R. 1216): "Those who select scholars for Jewish charitable scholarships have no difficulty at all." The well-meant intervention of the courts against religious discrimination has gone too far to be changed in the case of conditions subsequent forfeiting gifts on religious or racial grounds, at any rate in the latter of these cases. But in the case of a condition precedent they have now held that Roman Catholics and Free Churchmen enjoy no monopoly of definition. The Court of Appeal, in *Re Allen*, have held that the court will permit a beneficiary to prove, if he can, that he is a "member of the Church of England and an adherent to the doctrine of that church." It was admitted that some difficulty might be experienced in borderline cases, but it was hoped that they might "by all means save some" by allowing proof to be tendered by those who could show baptism, confirmation, communion, or ordination, in that Church. Paradoxically it was by no means clear that the beneficiary could in fact establish any of these things, since he was or had been a Roman Catholic. But other bodies had dealt with the problem of proof of membership of the Church of England, *e.g.*, charities limited to such members, and the court could do the same. Harman J., whose decision was not cited in the other case, held that two gifts in a will were alternative. If Rose married a man of Jewish faith and parentage she took the capital of a legacy; otherwise she did not. He held that she did not qualify (she in fact

married a person clearly not a Jew) because the qualification was too uncertain for proof. On the other hand, he held that the alternative gift took effect because the contrary was demonstrable and had happened. It is not clear, with respect, how one can say that a man can be shown not to be a Jew but cannot be shown to be a Jew. This decision must now be examined in the light of the decision of the Court of Appeal, though the result would no doubt be the same, the condition precedent being one which Rose had clearly broken from a "common sense" point of view. As the condition about religion and race was the main motive of the bequest to Rose, it failed, and did not become absolute (*cf. Re Elliott* [1952] Ch. 217).

(Theobald 431, 435.)

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5. *PLANNING CASES*

By T. A. Blanco White, Barrister-at-Law

Godstone R. D. C. v. *Brazil* (1953) 4 P. & C.R. 1

Planning control — enforcement notice — information — technical defects.—This case illustrates, primarily, just how technical the enforcement of planning control can be. It related to a site occupied by a caravan: not merely so occupied for twenty-eight days every year (which, of course, is always allowed), but permanently so occupied and without planning permission. The local planning authority served in October, 1952, a notice (an enforcement notice under section 23 of the Town and Country Planning Act, 1947) requiring the caravan to be removed "within seven days after the expiry of twenty-eight days from the service of this notice." The owner ignored the notice, which was duly followed up by an information alleging that, in contravention of the enforcement notice, the owner used the land as a site for a caravan "on December 17 and 30, 1952, and on January 12, 1953." Held, in due course, by the Divisional Court, that not only was the notice bad as not specifying any date upon which it was to come into effect (*cf. Burgess* v. *Jarvis* [1952] 2 Q.B. 41; *Mead* v. *Chelmsford R. D. C.* [1953] 1 Q.B. 32; noted at 16 *Conveyancer* 137, and 16 *Conveyancer* 470, respectively) but in any event the information itself was bad. The offence charged being, in effect, that of using the land for more than twenty-eight days in any calendar year, use in 1952 and in 1953 were two separate offences. Use on January 12, 1953, was no offence, for twenty-eight days of that calendar year had not yet elapsed; and further, the information was bad for duplicity.

Glover v. *Edmonton Corporation* (1953) 3 P. & C.R. 451

Compulsory purchase—compensation—price on previous sale—buyer in special position.—This case raised a point that must often enough turn up in valuing on compulsory purchase. The land compulsorily acquired was near to its owner's dwelling and was used by

him as garden and for keeping poultry. The basis of his claim for compensation was the price at which he had bought the land, not long before the relevant date; he thought he had got it cheap and the tribunal (the Lands Tribunal) agreed with him. The acquiring authority, it seems, argued that the sale concerned was not a fair basis for computation: for it was a sale to a buyer who by reason of the nearness of his house was in a unique position. The market price for such sales, it was apparently argued, is not the compulsory-purchase price. The argument failed: the tribunal holding that although, in assessing the value of land compulsorily acquired, no account must be taken of its value for a purpose for which only one man wants it, account is to be taken of the fact that the market value of land for any purpose is the price that would be paid by the purchaser who offered most. At least, this seems to have been the tribunal's reasoning, and if so it seems sound enough: but the language of the decision is obscure, and the case cited as authority seems hardly relevant.

6. *LANDLORD AND TENANT CASES*

By J. Muir Watt, M.A., of the Inner Temple, Barrister-at-Law

R. v. *Twickenham Rent Tribunal, ex p. Dunn* [1953] 3 W.L.R. 517; [1953] 2 All E.R. 734

Matrimonial home—Rent Restrictions Acts—Landlord and Tenant (Rent Control) Act, 1949.—The cases of *Old Gate Estates, Ltd.* v. *Alexander* [1950] 1 K.B. 311, *Middleton* v. *Baldock* [1950] 1 K.B. 657, *Bendall* v. *McWhirter* [1952] 2 Q.B. 466, established that a deserted wife had rights of a special kind in relation to the matrimonial home of which her husband was the tenant. Although a licensee, and enjoying neither a legal nor an equitable interest in land, it was held that she was entitled to remain in possession of rent-controlled premises so long as she paid the rent and performed the obligations of the tenancy. In *Dunn's Case,* however, the Divisional Court refused to extend the doctrine so as to enable a wife in such a situation to apply under section 1 of the Landlord and Tenant (Rent Control) Act, 1949, for a reduction of the rent. The wife is not the tenant nor has she any implied authority to make the application on behalf of her husband, the tenant. Her implied authority at common law is limited to pledging her husband's credit for necessaries. This decision helps a little to define the limits of the deserted wife's "special and anomalous" rights in relation to the matrimonial home, but her position has not yet been fully analysed.

(Megarry, 7th ed., pp. 46, 55.)

Emberson v. *Robinson* [1953] 1 W.L.R. 1129; [1953] 2 All E.R. 755

Rent Restrictions Acts—landlord by purchase—completion of contract made before the war.—In this case the Court of Appeal accepted the view, which had been taken in the Irish case of *Barrett* v.

Marshall (1920) 54 Ir.L.T.R. 214 that the relevant date for determining whether a person became landlord by purchasing the dwelling-house (so as to be excluded from claiming possession under para. (h) of the First Schedule to the 1933 Act) is the date of the contract for sale and not the conveyance. Here the contract had been made shortly before the war but completion did not, owing to war circumstances, take place until 1945. Shortly after the war began a tenancy was granted. The court held that, as the contract of sale under which the landlord acquired the property was made before the material date (September 1, 1939) the landlord was not debarred from proceeding under para. (h) to recover possession from the tenant.
(Rent Restrictions Guide, 3rd ed., p. 92; Megarry, 7th ed., p. 265.)

Hawes v. *Evenden* [1953] 1 W.L.R. 1169; [1953] 2 All E.R. 737

Rent Restrictions Acts—member of family—deceased tenant's mistress—children born of association.—The point was left open in *Gammans* v. *Ekins* [1950] 2 K.B. 328 and *Tinkham* v. *Perry* [1951] 1 K.B. 547 whether "family" for the purpose of section 12 (1) (g) of the 1920 Act would include a mistress under certain circumstances if there were children of the illicit union. In *Hawes* v. *Evenden* the tenant and his mistress had lived together as man and wife (although the mistress did not take the tenant's name) for twelve years, and two children had been born of the association. They all lived together as a family. It was held that in these circumstances the mistress was a member of the deceased tenant's family within section 12 (1) (g). Applying the test laid down in *Brock* v. *Wollams* [1949] 2 K.B. 388, 395, an ordinary man addressing his mind to the question would have said that the mistress was a member of the deceased's family. Somervell L.J. pointed out that this did not mean that anyone living in the house, such as a domestic servant, who had a child by the tenant would thereby qualify for protection under para. (g). The broad test in *Brock* v. *Wollams* must be applied in a common-sense way.
(Megarry, 7th ed., p. 209; Rent Restrictions Guide, 3rd ed., p. 102.)

Barnard v. *Towers* [1953] 1 W.L.R. 1203; [1953] 2 All E.R. 877

Rent Restrictions Acts—suitable alternative accommodation—sharing with another occupant.—The Court of Appeal held in this case that the offer of the share of a house is not an offer of suitable alternative accommodation to a tenant who under the tenancy has a house of his own. The actual facts were that the alternative accommodation suggested was the share of a house owned jointly by the tenant and her sister and occupied by the sister; the sister would have remained in occupation and shared the house with the tenant. It is worth noting that Somervell L.J. referred to the question whether section 3 (3) of the 1933 Act was exhaustive in regard to the question of alternative accommodation. The point did not arise, but he said

that if a tenant whom it was sought to evict had a house of his own which was empty, and to which it was reasonable that he should go, but which was outside the Rent Acts, it would clearly not be within section 3 (3); but it is difficult to believe that the court would be precluded from considering it as alternative accommodation.
(Rent Restrictions Guide, 3rd ed., p. 83; Megarry, 7th ed., p. 275.)

Martinali v. *Ramuz* [1953] 1 W.L.R. 1196; [1953] 2 All E.R. 892

Leasehold Property (Temporary Provisions) Act, 1951—*tenancy at will—effect of service of writ in possession action.*—In this case applications were made under section 10 (1) of the Leasehold Property (Temporary Provisions) Act, 1951, for the renewal of the tenancies of shops. The tenancies were tenancies at will, and the landlord had issued a writ for possession. It was held by the Court of Appeal that the service of a writ in a possession action was not a notice to quit within the meaning of section 10. This ruled out the tenant's application, and it was unnecessary to decide the question whether a tenancy at will is covered by section 10 (1) at all. Singleton L.J., however, with whose judgment the other members of the court agreed, expressed the opinion that a tenancy at will was not so covered.

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7. *REVENUE CASES*

By Desmond Miller, of the Inner Temple, Barrister-at-Law

(*Note*:—Where a case is not reported in any of the general series of law reports it is cited from the *Annotated Tax Cases* (A.T.C.) or *Taxation Reports* (T.R.).)

Income Tax

Household v. *Grimshaw* [1953] 1 W.L.R. 710; [1953] 2 All E.R. 12; [1953] T.R. 147 (Ch.D.).

Statutory provisions: Case II of Schedule D and Schedule E, the Income Tax Act, 1918.

Point: A lump sum received by an author as consideration for his consent to the cancellation of an agreement entered into by him in the course of and for the purposes of his profession, is assessable under Case II of Schedule D as a receipt of that profession. *Aliter*, if the agreement had constituted an employment assessable under Schedule E. *Henley* v. *Murray*, 31 T.C. 351.

Facts and Decision: The appellant taxpayer had been an author since 1936 and, in 1943, while in H.M. Forces, he entered into an agreement with a film company under which he agreed to give his exclusive services to that company for a period of twelve consecutive weeks in each of the three consecutive years commencing on, or within three months after, his discharge from the Forces. For the remaining

nine months of each year (during the currency of the agreement) the appellant was at liberty to carry on his vocation as author without restriction, except that in respect of novels produced during that period he was obliged to offer the film rights to the film company. For the consideration as stated, the appellant was to be entitled to a sum of £10 per week payable from the commencement of the agreement, until the first of the three monthly periods, during which he was to receive £200 per week.

The agreement was carried out in full during the year 1945 but in 1946 the film company were desirous of bringing it to an end and, by agreement dated September 11, 1946, the 1943 contract was cancelled the appellant receiving, as consideration for this cancellation, the sum of £3,000.

This sum, less a percentage commission due to his agent, was assessed to tax under Case II of Schedule D as a receipt from his profession of author.

The appellant appealed to the Special Commissioners, maintaining that the 1943 contract was an employment, that his emoluments were assessable under Schedule E, and as a consequence, upon the authority of the decision in *Henley* v. *Murray* (*supra*) that the sum received for cancellation of this contract was not chargeable with tax. The Special Commissioners sustained the assessment, holding that the 1943 contract was not an employment, but a mere engagement in the course of the exercise of the appellant's profession as author.

Held (affirming the Special Commissioners' determination):—

(i) that the contract (of 1943) was not a contract of employment, and *ex hypothesi*, that the lump sum of £3,000 was not a sum paid as consideration for the cancellation of a contract of employment;

(ii) that the contract (of 1943) was not a capital asset of the appellant's profession and, that the payment received for its abrogation was not therefore a payment in respect of the surrender of a capital asset, but a payment which must be treated as a receipt of that profession.

Hutton v. *C. I. R.* [1953] 1 W.L.R. 729; [1953] 2 All E.R. 93; [1953] T.R. 163 (Ch.D.).

Statutory provisions: Rules 19 and 21, the General Rules, the Income Tax Act, 1918 (now sections 169 and 170, the Income Tax Act, 1952).

Point: The credit for interest given on surrender of tax reserve certificates in payment of tax is analogous to the discount on a trade debt. Such credit does not therefore create a separate fund but merely serves to increase the balance standing to the credit of the recipient's profit and loss account.

Facts and Decision: Tax reserve certificates issued pursuant to Treasury Memorandum, dated December 22, 1941, earned interest at one per cent. per annum in so far as they were applied in payment of tax but carried no interest to the extent to which they were not so

applied. Interest thus earned was expressly franked from all taxes by section 29 of the Finance Act, 1942.

The appellant taxpayer was, at all material times, the holder of 50 per cent. of the share capital in a company which had purchased tax reserve certificates to meet its income tax liabilities. The company's course of conduct in relation to these certificates was consistent as, for example, in the year 1943 it applied certificates to the nominal value of £18,600 and was credited with interest thereon to the extent of £78 13s. 4d. The company thereby discharged £18,678 13s. 4d. from its total tax liability in respect of the year 1943.

In the accounts of the company for that year, the amount of interest thus saved, *i.e.*, £78 13s. 4d., was shown as a separate credit in the profit and loss account. By a resolution, dated July 30, 1943, the company resolved that the sum of £78 13s. 4d. in respect of interest on tax certificates be paid (by way of dividend) direct to the shareholders in proportion to their holdings of shares. The taxpayer, by virtue of his 50 per cent. shareholding thereupon received £39 in cash.

The company did not deduct tax on payment of this dividend (pursuant to rule 20 of the All Schedules Rules) relying on the principle established by the decision in *Neumann* v. *C. I. R.* [1934] A.C. 228, to the effect that if the company was entitled to regard the dividend of £78 as being the distribution of a sum which had not borne tax in its hands, it was not entitled to deduct tax on payment.

The importance from the taxpayer's view was, of course, that if the distribution was within the principle of *Neumann* v. *C. I. R.* (*supra*), the sum of £39 received by him pursuant to such distribution did not form part of his total income for surtax purposes. Assessment was, however, made upon the taxpayer and sustained by the Special Commissioners.

Held (affirming the Special Commissioner's determination): that the credit of interest did not create a separate fund, but swelled the amount standing to the credit of the company's profit and loss account; it was out of this latter amount that the distribution had been made and consequently the dividend formed part of the taxpayer's total income.

I. R. C. v. *Nicolson* [1953] 1 W.L.R. 809; *sub nom. I. R. C.* v. *Nicholson* [1953] 2 All E.R. 123; *sub nom. I. R. C.* v. *Frank Butler Memorial Fund Trustees* [1953] T.R. 171 (Ch.D.).

Statutory provisions: Section 37, the Income Tax Act, 1918; sections 38, 41, the Finance Act, 1938. (Now see sections 404, 411, the Income Tax Act, 1952.)

Point: To obtain the benefit of the proviso to section 404 (1) (*supra*) in any year of assessment, there must be found in the settlement (i) an obligation to pay, (ii) a power of revocation, and (iii) the suspension of that power (to revoke) for the period of six years from the first payment due. *Taylor* v. *C. I. R.* [1946] 1 All E.R. 488 considered and applied.

Facts and Decision: By deed dated March 27, 1943, Patience Nicholson, as settlor, constituted a trust for, admittedly, charitable objects and pursuant to its terms she covenanted to pay the trustees during her life the monthly sum of £350. The deed reserved a power of revocation in the following terms:—

> "PROVIDED ALWAYS that the Settlor shall have power exercisable by deed at any time or times after the expiration of seven years from the date hereof to revoke wholly or partially the foregoing covenant."

Up to and including the monthly payment made on February 28, 1950, the settlor deducted income tax from each payment and the trustees, as charitable trustees, secured the repayment of this tax pursuant to section 37 of the Income Tax Act, 1918. On February 28, 1950, the settlor executed a supplemental deed, to the deed of 1943, by the effect of which the exercise of the power of revocation reserved to her by the principal deed was postponed for the further period of three years, terminating with March 27, 1953. The settlor having deducted tax in respect of payments made subsequent to March 31, 1950, the trustees claimed repayment under section 37 (*supra*). The claim was rejected on the ground that by force of section 38 (*supra*), the settlement was to be treated as a revocable settlement and the income arising thereunder therefore as the income of the settlor and not of the trustees.

The Special Commissioners allowed the trustees' appeal.

Held (reversing the Special Commissioners' decision):—

(i) that if, for the purposes of section 38 (*supra*), the only settlement was the settlement of 1943, then the power to revoke was operative after March 28, 1950; and,

(ii) that if the settlement was, by force of section 41 (*supra*), a compound settlement comprised by the deed of 1943, coupled with the deed of 1950, the first payment thereunder fell due on March 31, 1950, and the power of revocation (under the compound settlement) was exercisable in 1953, *i.e.*, within the period of six years.

In either event, the settlement fell within the mischief of the proviso to section 38 (1) (*supra*), and the income arising thereunder, subsequent to March 31, 1950, was necessarily to be treated for income tax purposes as the income of the settlor.

Morgan v. *Tate & Lyle, Ltd.* [1953] 3 W.L.R. 1; [1953] 2 All E.R. 162; [1953] T.R. 175 (C.A.).

Statutory provisions: Rule 3 (a) of the Rules applicable to Cases I and II of Schedule D, the Income Tax Act, 1918 (now section 137 (a), the Income Tax Act, 1952).

Point: The question whether expenditure is capable of being regarded as made wholly and exclusively for the purposes of any given trade, within the meaning of rule 3 (a) (*supra*), is a question of law: *C. I. R.* v. *Dowdall, O'Mahoney & Co., Ltd.* [1952] A.C. 401 applied. Subject to this overriding consideration, the question

whether any particular disbursement was made wholly and exclusively for the purposes of the particular trade is an issue of fact.

Facts and Decision: The appellant company expended £15,339 15s. 2d. through an agent, Aims of Industry, Ltd., in meeting the cost of a campaign conducted by that agent against the nationalisation of the sugar-refining industry, in which the company was engaged. Evidence was given by the company's chairman (Lord Lyle) and secretary, which was accepted by the Commissioners, that the Board believed that there was a real risk of the nationalisation of the sugar-refining industry in general and of the company's undertaking in particular, and further, that the Board believed in this event that the State would take over the company's assets and business, thus bringing completely to an end the whole of the trading activities of the company in its business of sugar-refining. The Revenue refused the company's claim to a deduction of the above-mentioned sum, in computing its profits for the year of assessment 1950/51, maintaining (i) that the expenditure was of a capital nature, (ii) that it was not expended wholly and exclusively for the purposes of the company's trade, since, as was conceded, the expenditure related to, and was concerned with, the sugar-refining industry as a whole and was not confined to the appellant company's undertaking, and (iii) that it was not directed to earning profits, but to the question of who should retain those profits once earned, and again therefore could not be regarded as wholly and exclusively expended for the purposes of the company's trade.

The General Commissioners held that the sum was an admissible deduction in computing the company's profits and their finding was affirmed on appeal by Harman J.

Held (affirming the decision of Harman J.) (Singleton L.J. dissenting):—

(i) that the expenditure was not of a capital nature (the point was abandoned in argument);

(ii) that the fact that there was duality of purpose in the expenditure, *i.e.*, that the sugar-refining industry as a whole benefited thereby, did not cause the expense to be any the less wholly and exclusively incurred for the purposes of the appellant's trade, and

(iii) since rule 3 (a) (*supra*), as construed and explained by the authorities, did not prohibit the deduction sought, it remained a question of fact to be determined in accordance with the ordinary principles of commercial trading. The Crown's appeal was accordingly dismissed and leave to appeal to the House of Lords granted.

Jennings v. *Middlesbrough Corporation* [1953] 1 W.L.R. 833; [1953] 2 All E.R. 207; [1953] T.R. 239 (Ch.D.).

Statutory provisions: Rule 5 of the Rules applicable to Cases I and II of Schedule D, the Income Tax Act, 1918 (now section 136, the Income Tax Act, 1952).

Point: Where a trade in lettings was carried on by the owner of land, profits arising from that trade were not capable of apportionment as a matter of law between (1) ownership, and (2) the provision of services and chattels. There was one entire trade only, and its profits were to be charged under Case I of Schedule D, subject to the deduction under rule 5 of the Rules applicable to Cases I and II of Schedule D (*supra*) of the amount of the Schedule A assessment on the property in question.

Coman v. *Rotunda Hospital* (*Governors*) [1921] 1 A.C. 1 considered and applied.

Stokes v. *Bennett* [1953] 3 W.L.R. 170; [1953] 2 All E.R. 313; [1953] T.R. 255 (Ch.D.).

Statutory provisions: Rules 19 and 21, the General Rules, the Income Tax Act, 1918 (now sections 169 and 170, the Income Tax Act, 1952).

Point: Rule 21 (*supra*) is applicable to a person resident abroad, certainly where the income (upon which the rule operates) has a source within the United Kingdom.

Facts and Decision: In 1938 the appellant taxpayer obtained a divorce from her husband in the Divorce Division of the High Court and, subsequent thereto, on February 1, 1938, an order was made that the husband should pay the appellant, monthly during their joint lives or until further order, maintenance at the rate of £22 per month "free of tax." At the date of the order, both the appellant and her husband were resident in the United Kingdom. In 1946 the husband went to reside and work in Brazil where he was resident at the date of the present proceedings. He continued to make monthly payments to the appellant, but no evidence was brought before the Commissioners which showed that he had deducted tax on payment or that he was in receipt of income which had suffered British income tax.

In these circumstances, the Revenue raised assessment on the appellant in respect of the sums received by her (from her husband) on the footing that such sums were untaxed income in her hands. The assessments were made under Case III of Schedule D in reliance upon the principle established by the decision in *Glamorgan Quarter Sessions* v. *Wilson* [1910] 1 K.B. 725.

The Special Commissioners confirmed the assessments.

Held (reversing the Special Commissioners' decision):—

(i) that rule 21 operated upon the income arising under the court order, since this was income arising in the United Kingdom.

(ii) In the absence of affirmative evidence, the fact that the husband had made payments of the net sums prescribed by the court order raised the inference that he was intending to and did deduct tax from the gross amount due under that order.

(iii) As a consequence of the foregoing, the husband having paid the appellant the net amounts due pursuant to the order (and not the gross), no assessment could be made upon the appellant.

Boarland v. *Madras Electric Supply Corporation* [1953] 1 W.L.R. 920; [1953] 2 All E.R. 467; [1953] T.R. 259 (Ch.D.).

Statutory provisions: Rule 11 (2) of the Rules applicable to Cases I and II of Schedule D, the Income Tax Act, 1918 (now section 145 (2), the Income Tax Act, 1952).

Point: As the word "person" in rule 11 (2) (*supra*) is not limited by its context, it is a word of wide import and apt to include the Crown.

Edwards v. *Bairstow and Harrison* [1953] T.R. 155 (Ch.D.).

Statutory provisions: Case I of Schedule D, the Income Tax Act, 1918 (now section 123, the Income Tax Act, 1952).

Point: Whether a trade is or is not carried on is an issue of fact upon which the Commissioners' determination will be final, in England at least. *Cooper* v. *Stubbs* [1925] 2 K.B. 753 applied. (*Note*: the position would appear to differ in Scotland where the issue is one of mixed fact and law: *cf. Fraser* v. *C. I. R.*, 1942 Sess.Cas. 493.)

Facts and Decision: The appellants purchased cotton-spinning plant with the object of immediate resale at a profit. In the event, there was no immediate resale of the plant as a lot, but it was disposed of in five sales spread over the period of two years. A profit of some £18,000 accrued to the appellants as a result of the transaction in its entirety.

The Revenue raised assessment on this profit under Case I of Schedule D. The General Commissioners discharged the assessment on their determination, which was in the following form:—

> "We, the Commissioners, having considered the facts and evidence submitted to us are of opinion that this was an isolated case and not taxable."

Held: The fact that the transaction was isolated was a relevant consideration but not decisive of the matter. Accordingly, the case must be remitted to the General Commissioners to find whether the transaction was or was not an adventure in the nature of trade.

Cain v. *Scholefield* [1953] T.R. 201 (Ch.D.).

Statutory provisions: Section 137 (5), the Income Tax Act, 1918 (now section 52 (6), the Income Tax Act, 1952).

Point: The duty of General Commissioners on an appeal against assessment is, by lawful evidence called before them, to determine upon the proper amount of that assessment. The principle so stated

of course involves that there may be an increase as well as decrease in the amount of the assessment. *R.* v. *Special Commissioners, ex p. Elmhirst* [1936] 1 K.B. 487 applied.

Burlah Trust, Ltd. v. *C. I. R.* [1953] T.R. 245 (Ch.D.).

Statutory provisions: Section 21, the Finance Act, 1922, section 15, the Finance Act, 1939 (now sections 245 and 260, the Income Tax Act, 1952).

Point: The provisions of section 15 of the Finance Act, 1939, give the Special Commissioners power in the circumstances specified by the section to apportion the income of an investment company, for surtax purposes, to individuals, whether members of the company or not, who are able to secure or likely to be able to secure that the company's income or assets is or are applied for their benefit and if the stated criteria are satisfied to draw the inference, for the purposes of the section, that an individual is able (to the extent stated) to secure that the income or assets of the company are applied for his benefit.

The decision in this case illustrates the duty of the Board of Referees, in construing section 15 (3) of the Finance Act, 1939, and applying that subsection on the facts of the case.

Goff v. *Osborne & Co. (Sheffield), Ltd.* [1953] T.R. 265 (Ch.D.).

Statutory provisions: Section 33, the Finance Act, 1926 (now section 342, the Income Tax Act, 1952).

Point: In order to obtain the right to the relief for loss provided by section 33 (*supra*) it must be shown that there is a continuity of the business and of the proprietorship, in which and under whose control respectively, the loss was sustained: *United Steel Co.* v. *Cullington* [1940] A.C. 812. In the present instance, the necessary continuity in the business was lacking.

Dale v. *C. I. R.* [1953] 3 W.L.R. 448; [1953] 2 All E.R. 671; [1953] T.R. 269 (H.L.).

Statutory provisions: Sections 47 and 49, the Finance Act, 1948; section 14 (3), the Income Tax Act, 1918 (as to the latter, now see section 525, the Income Tax Act, 1952).

Point: A trusteeship is an office and, accordingly, if a testator attaches remuneration to the trusteeship of his will, it becomes an office of profit within section 14 (3) (*supra*).

Facts and Decision: The appellant was appointed trustee of the Wellcome Foundation by the will of Sir Henry Wellcome, deceased. The duties were onerous and the will accordingly provided for the payment of £1,000 per annum free of tax to the appellant so long as he continued as trustee. The appellant was assessed to special contribution on the footing that his income, as trustee, was investment

income and not earned income. The Special Commissioners on appeal decided that in view of the decisions in *Baxendale* v. *Murphy* [1924] 2 K.B. 484, and *Hearn* v. *Morgan*, 26 Tax Cas. 478 (to the effect that the remuneration of a trustee could properly be assessed only under Case III of Schedule D) they must hold that such remuneration could not arise from an office of profit within section 14 (3) (*supra*) and, *ex hypothesi*, was not earned income. Their decision was reversed by Harman J. who, in his turn, was overruled by the Court of Appeal.

Held (reversing the order of the Court of Appeal): that the income was income from an office of profit and therefore earned income within section 14 (3) of the Income Tax Act, 1918.

STAMP DUTY

Baddeley (*Newtown Trustees*) v. *C. I. R.* [1953] 3 W.L.R. 135; [1953] 2 All E.R. 233; [1953] T.R. 219 (C.A.).

Statutory provisions: Section 54 (1), the Finance Act, 1947.

Point: The saving accorded by section 54 (1) (*supra*) extends to trusts established for charitable purposes only.

PROFITS TAX

C. I. R. v. *Custodis* (*1922*), *Ltd.* [1953] T.R. 167 (Ch.D.).

Statutory provisions: Paragraph 11 of the Fourth Schedule to the Finance Act, 1937.

Point: The limit imposed by the paragraph on directors' remuneration is an upper limit. Where the amount actually paid by the company to its directors is less than this upper limit, it is therefore, only the amount so paid which can be treated as a deduction in computing the paying company's profits for profits tax purposes.

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8. *MISCELLANEOUS*

Wakeford v. *Wakeford* [1953] 1 W.L.R. 1222; [1953] 2 All E.R. 827

Matrimonial home—maintenance order designed to put pressure on husband to grant tenancy to wife.—The short point of this case was whether it was proper to put pressure to bear on a husband to grant his wife, whom he had deserted, a tenancy of the flat she occupied, instead of a licence, by making an excessive order for maintenance and, not surprisingly, the Divisional Court said it was not.

Style v. *Style and Keiller* [1953] 3 W.L.R. 613; [1953] 2 All E.R. 836

Husband and wife—settlement of wife's property on divorce—points of practice.—On an application under section 24 of the Matrimonial Causes Act, 1950, for an order that a wife should settle property on the husband, the court has no power to refer the deed to conveyancing counsel without the consent of the parties. (The position is similar where an application is made under section 25, but otherwise under section 19 (1), 22 (4), 23 (2) or 26 (3).) Secondly, there is no power to ante-date the settlement or order so that it shall be operative from a date earlier than the date of the settlement, even though the wife has deliberately caused the delay.

Rose (F. F.) (London), Ltd. v. *William H. Pim, Jnr. & Co., Ltd.* [1953] 3 W.L.R. 497; [1953] 2 All E.R. 739

Mistake as to nature of goods—rectification.—A broker has been defined as a person who buys goods he cannot pay for and sells goods he has not got. The plaintiffs in this case went further: they did not even know what they wanted to buy. In North Africa horsebeans are grown but, with that precision that is a characteristic of French, that language distinguishes between feves, feveroles and fevettes (large, medium and small horsebeans). When the plaintiffs received an inquiry for feveroles they got in touch with the defendants and asked what they were. The defendants made inquiries and, as a result of what they were told, informed the plaintiffs that feveroles were horsebeans. The plaintiffs then purchased horsebeans from the defendants, both parties being under the impression that horsebeans and feveroles were the same thing. After delivery of the goods, the plaintiffs claimed rectification of the contract by inserting the word "feveroles" in brackets after the word "horsebeans," and damages for breach of the contract as rectified. The Court of Appeal held that they were not entitled to rectification. A plaintiff can claim rectification of a written document which fails accurately to record what in fact has been agreed, not one which fails to record what the parties intended, but did not in fact, agree; the remedy for this type of mistake is rescission. In this case the parties agreed on the sale and purchase of horsebeans, though, had they known more about the subject, they would have stipulated for feveroles. In the particular circumstances rescission was not open to the plaintiffs.

Chantrey Martin v. *Martin* [1953] 3 W.L.R. 459

Discovery—disclosure by accountants of papers relating to a client's affairs.—A point of some importance arose in this case. The defendants were a firm of chartered accountants and the plaintiff a former employee. The plaintiff sought discovery of the working accounts and other papers brought into existence by the defendants in the course of preparing of a final audit of one of their clients. The

defendants resisted discovery on the ground that the accounts and papers were the property of the client. The Court of Appeal held, following *Leicestershire C. C.* v. *Michael Faraday & Partners, Ltd.* [1941] 2 K.B. 205 (papers prepared by rating valuers) and distinguishing *Ex p. Horsfall* (1827) 7 B. & C. 528 (papers prepared by a solicitor), that documents prepared by accountants to enable them to carry out their expert work are their own property in the absence of any contrary agreement. These do not include correspondence between the accountants and the Inland Revenue relating to the client's tax affairs, which belong to the client, for the accountants are acting as the client's agents in conducting the correspondence.

Then it was argued that to disclose the documents would involve a breach of confidence (*cf. McNicol* v. *Sportsman's Book Stores* (1930) Macg.Cop.Cas. (1928–35) 116); but the court held that this is not an objection to giving discovery. The court did, however, require the defendant not to divulge the contents of the documents otherwise than for the purpose of the existing litigation, and not to use the information contained therein for any collateral purpose.

CORRESPONDENCE

To the Editor,
The Conveyancer & Property Lawyer.

Sir,

Exchange of Contracts before Searches

I feel that Mr. Walford in his comments on the Law Society's new condition 21 on pages 261 and 262 of your July-August issue does the condition less than justice.

Until the millennium comes and land can be bought and sold over the counter there is bound to be an interval between the time when the parties reach their bargain and the time when the price is paid and the property transferred. During that interval the purchaser needs to make certain investigations and there are also arrangements as to finance and possession to be made in some cases.

In the days when the purchaser's investigations could be confined to matters of title, the interval was covered by a contract whose main purpose was to secure that neither party could withdraw except for good reason. In recent years, however, a purchaser has had to extend his investigations to finding out what the local authorities have done or can do or intend to do about the property and, since the existing forms of general conditions did not meet the case, the interval between the making of the bargain and completion has had to undergo a substantial extension which has not been covered by a contract.

That this is not appreciated (in any sense) by the layman is clear from the impatience of one's vendor and purchaser clients, from five minutes' conversation with any estate agent and from frequent correspondence in the lay press. Condition 21 is an attempt to cover the whole interval by a contract and if used with understanding it cannot prejudice either party but will achieve what each has been calling for.

On the vendor's side, the condition gives the opportunity to prevent rescission by obtaining the removal of any land charge or other obstacle which can be removed. To avoid having to rely on this a vendor can (and should) disclose any obstacle of which he has knowledge in the contract and, to make sure he has disclosed everything, he can make local searches and enquiries himself before preparing the contract.

It will sometimes be the case that a prospective purchaser is unable to sign a contract until the draft has been amended or consent to a change of use or an essential piece of information has been obtained. In such cases he will be able to make his searches while this is being done and no advantage will therefore be had from the condition. I do submit, nevertheless, that the solicitor who advises his client, whether vendor or purchaser, to agree to the adoption of the condition where possible, will be serving that client's best interests.

Yours faithfully,

S. W. G. Sims.

Bristol 1, September 24, 1953.

THE LIBRARY

The Law of Wills. Fourth Edition. By S. B. Bailey, M.A., LL.M. London: Sir Isaac Pitman & Sons, Ltd. 1953. xlix and 281 pp. (40s.).

A warm welcome is due to the fourth edition of Professor Bailey's well-known work on wills. Written primarily for students, and intended only to serve as an introduction to the subject, it contains such a wealth of material, and is written in such a clear and attractive manner, that it cannot fail to be of value to practitioners also. The chapters on Tenant for Life and Remainderman and on the Rule against Perpetuities are among the best accounts of these difficult subjects that have appeared in print.

In this edition, the work has been thoroughly revised. Some topics receive an extended treatment, and the Table of Cases now contains references to reports other than the Law Reports—a welcome improvement. One or two slips must be pointed out. The second sentence in note 2, p. 5, has got displaced—it belongs to the note following. *Re Priest* [1944] Ch. 58, which is cited on p. 39 in connection with the Wills Act, 1861, might more properly have been cited on p. 73 in connection with the Wills Act, 1837, s. 15 (gifts to attesting witnesses). On p. 82, it is said that the crucial test under the Inheritance (Family Provision) Act, 1938, is whether it was *unreasonable of the deceased* to have made no (or no larger) provision for the applicant in his will. But the Act does not say this: it says that the *disposition made by the deceased* must not make reasonable provision for the applicant. The difference is not always merely one of words, as *Re Franks* [1948] Ch. 62 (cited on the same page) dramatically shows. Arrears of wages due from an insolvent estate now have priority to the extent of £200, not £50 and £25 as stated on p. 242. Professor Bailey is a past master of the art of economising space, but it may be suggested that the sections on Secret Trusts (pp. 125–128) and Election (pp. 128–130) could have been expanded with advantage.

For a reviewer to complain of the rising cost of law books is probably as futile as the experiment of Canute. Yet it does seem that, for a students' book of this size, the price is on the high side. And the process of publication seems to have taken longer than might have been expected—from internal evidence, some sixteen months. The irruption of the Intestates' Estates Act, 1952, into this somewhat leisurely period of gestation must have caused a headache to author and publisher. Professor Bailey solves the problem skilfully by summarising the Act shortly on pages 35 and 83, and more fully in an Appendix. On p. 35 he says that the new rules may work injustice by giving the whole of a small estate to the widow and leaving nothing to the children. On p. 83 he points out that the Inheritance (Family Provision) Act, 1938, as amended by the Act of 1952, now applies even if the deceased died wholly intestate. Curiously, there is no cross-reference between these passages. One fears that some students may be mystified by the enactment that "the court shall not be bound to assume that the law relating to intestacy makes reasonable provision in all cases." An illustration of an intestate leaving £5,000, a second wife, and three children by his former marriage might have quietened many doubts.

Not the least attractive feature of this edition is the large proportion of recent cases cited, as compared with older authorities. It is essentially a modern book written from a modern standpoint, and may be confidently recommended to students and practising lawyers.

J. H. C. Morris.